

4

A N
E N Q U I R Y
I N T O T H E
Power of Dispensing
W I T H
P E N A L S T A T U T E S.

Together with Some
Animadversions

U P O N
A Book writ by Sir *EDW. HERBERT*,
Lord Chief Justice of the Court of *Common Pleas*,
E N T I T U L E D,
A short Account of the Authorities in Law, upon
which J U D G M E N T was given in
Sir Edward Hales's Case.

By Sir *R O B E R T A T K Y N S*,
Knight of the Honourable Order of the *Bath*, and late
one of the Judges of the *Common Pleas*.

Digna vox est Majestate Regnantis, Legibus Alli-
gatum se esse Principem profiteri.

L O N D O N :

Printed for *Timothy Goodwin*, at the *Maiden-head* against
St. Dunstan's-Church in *Fleet-street*. 1689.

ADVERTISEMENT.

January the 21st, 1689.

TO *Morrow will be Published by Tim. Goodwin, at the Maiden-head against St. Dunstan's Church in Fleet-street, The Power, Jurisdiction, and Priviledge of PARLIAMENT: And the Antiquity of the House of Commons asserted: Occasioned by an Information in the King's-Bench, by the Attorney General, against the Speaker of the House of Commons. As also a Discourse concerning the Ecclesiastical Jurisdiction in the Realm of England; occasioned by the late Commission in Ecclesiastical Causes. By Sir Robert Atkyns, Knight of the Honourable Order of the Bath, and late one of the Judges of the Court of Common-Pleas.*

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St. Dunstan's-Church in Fleet-street. 1689.

AN
 ENQUIRY
 INTO THE
 SUBJECT OF DISSENTING
 WITH
 PENAL STATUTES

Animadversions

A Book writ by SIR EDWARD HERBERT
 Lord Chief Justice of the Court of Common Pleas

ENTITLED,
 A Short Account of the Authorities in Law upon
 which FUGGMENT was given in
 Sir Edward Hales's Case.

By Sir ROBERT MACKENZIE
 Knight of the Honourable Order of the Bath and late
 one of the Judges of the Common Pleas.

Digne vox est Majestatis Regum, Legibus All
 gatum se esse Principum profecti.

21:01-8091
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Printed for Timothy Goodwin, at the Maiden-head against
 St Dunstons-Church in Fleet-Street. 1689.

A N
ENQUIRY
 INTO THE
Power of Dispensing
 WITH
Penal Statutes.

25 C A R. II. Cap. 2.

An Act for preventing Dangers which may happen from
 Popish Recusants.

TH E preventing Dangers which may happen from Popish Recusants, and quieting the Minds of his Majesties good Subjects, Be it enacted, &c. That every person that shall bear any Office, Civil or Military, &c. or shall have Command or Place of Trust from or under his Majesty, &c. within the Realm of England, &c. shall personally appear in the Court of Chancery, or of the Kings-Bench, or at the Court of Quarter-Sessions in that County where he shall reside within three Months next after his Admittance into any of the said Offices, and there in open Court, take the several Oaths of Supremacy and Allegiance, and shall also receive the Sacrament of the Lord's Supper, according to the Usage of the Church of England, in some Parish-Church, upon some Lord's-day, immediately after Divine Service.

And every the person aforesaid, that doth or shall neglect or refuse to take the said Oaths and the Sacrament in the said Courts, and at the respective times aforesaid, shall be ipso facto adjudged incapable, and disabled in Law to all intents and purposes whatsoever, to have, occupy, or enjoy, the said Office or Employment, and every such Office and Place shall be void, and is hereby adjudged void.

And every person that shall neglect or refuse to take the said Oaths or the Sacrament as aforesaid, and yet after such neglect or refusal, shall execute any of the said Offices, after the said times expired, wherein he ought to have taken the same, and being thereupon lawfully convicted upon any Information, &c. in any of the King's Courts at Westminster, or at the Assizes, every such person shall forfeit 500 l. to be recovered by him that shall sue for the same.

And at the same time when the persons concerned in this Act shall take the said Oaths, they shall likewise subscribe the Declaration against the Belief of Transubstantiation under the same Penalties as by this Act is appointed.

Paschæ 2 Jac. II. *In the King's-Bench.*
1686-

Arthur Godden Plaintiff, in an Action of Debt of 500 l.
grounded upon the Act of 25 Car. 2. for preventing Dan-
gers from Popish Recusants.

Sir Edward Hales, Bar^t, Defendant.

Declaration.

THE Plaintiff declares, That the Defendant after the First day of Easter-Term, 1673. sc. 28 Nov. 1 Jac. 2. at Hackington in Kent, was admitted to the Office of a Colonel of a Foot-Regiment.

That being a Military Office, and a Place of Trust under the King, and by Authority from the King.

And the Defendant held that Office by the space of three Months next after the 28 Nov. 1 Jac. 2.

And from thence, till the time of this Action begun, he was and still is an Inhabitant and Resident of the Parish of Hackington.

And the Plaintiff taking it by Protestation, that the Defendant within three Months next after his Admission into the said Office of Colonel, did not receive the Sacrament in Manner as the Act directs, but neglected to receive it.

Avers, that the Defendant did neglect to take the Oaths of Supremacy and Allegiance; either in the Chancery, or in the Kings Bench, or at any Quarter-Sessions in Kent, or in the Place where he was resident, either the next Term after his admission to his said Office, or within three Months after.

And that the Defendant after such neglect, sc. 10 Mar. 2 Jac. 2. at Hackington in Kent, did exercise the said Office, and still doth, contrary to the Statute of 25 Car. 2. for preventing Dangers from Popish Recusants.

Whereupon the Defendant at Rochester, at the Assizes held 29 Mar. 2 Jac. 2. was duly Indicted for such his neglect, and for executing the said Office contrary to the said Statute.

And thereupon duly Convict, as by the Record thereof appears, whereupon the Plaintiff became entitled to this 500 l. as forfeited by the Defendant.

Plea.

The Defendant pleads, that the King within the three Months, in the Declaration mentioned, and before the next Term or Quarter-Sessions, after his admittance to the said Office, and before his Suit began, sc. 9 Jan. 1 Jac. 2. by his Letters Patents under the Great Seal, and here produced in Court, did dispence with, pardon, remit, and discharge (among others) the Defendant from taking the said Oaths, and from receiving the Sacrament, and from subscribing the Declaration against Transubstantiation or Tests in the Act of 25 Car. 2. for preventing Dangers from Popish Recusants, or in any other Act; and from all Crimes, Convictions, Penalties, Forfeitures, Damages, Disabilities, by him incurred by his exercising the Office of Colonel.

Or by the Act intituled, An Act for the Preserving of the King's Person

son and Government, by disabling Papists from sitting in either House of Parliament. Or by the Acts made in the first or third Years of King James the First, or the Acts made 5 Eliz. or 23, or 29, or 35 Eliz.

And the King, by his Letters Patents, granted, that the Defendant should be enabled to hold that Office in any Place in England, or Wales, or Berwick, or in the Fleet, or in Jersey, or Guernsey, and to receive his Pay or Wages.

Any Clause in the said Acts, or in any other Act notwithstanding & non obstante, that the Defendant was or should be a Recusant convict.

As by the said Letters Patents doth appear.

Whereupon the Defendant prays the Judgment of the Court, whether the Plaintiff ought to maintain this Action.

The Plaintiff demurr'd generally to this Plea.

The Defendant joyned in Demurrer.

Judgment is given for the Defendant.

THE Order I shall observe in speaking to this Case, as to the (Order.) Point upon the Dispensation, shall be this :

First, I shall open this Act of 25 Car. 2. and shew the great Occa- The Act of sion and Necessity for the Making of it ; the Scope and Design of it ; 25 Car. 2. the excellent Remedy it does prescribe ; and the great Benefit and Security that might arise to the Nation from it, were it duly observ'd.

Secondly, I shall then discourse briefly of the Nature of Law in gene- Of the Law ral, as far only as may be useful and pertinent to our present Case, and in general. of the great Force and Authority that a Law ought to have, and of the great Veneration that should be paid to it, especially if the True Religion, and the Honour of Almighty God, the Safety of the Government, and the Publick Good and Peace of the Nation depend upon it, as they all do upon this Act of 25 Car. 2.

Thirdly, In the next place, I shall give an Account of the True Na- Of a Dispen- ture (as near as I can) and of the Original and Growth of the Notion tion. or Invention call'd a Dispensation, and who were the first Authors of it, and about what time it began, I shall endeavour to shew the right use of it, (if there be any,) and where the just Power of granting Dispensations does reside, as also the abuse of it, and how that according to the late Practice, these Dispensations are contrary and repugnant to the Nature and Properties of Law, tho' they pretend themselves to be Law, they have a different Original and Foundation, and do indeed subvert Law.

First, For the Occasion and Necessity for Making of this Act of Par- Of this parti- liament, and the Scope and Design of it, and the Ends aimed at, they cular Act of all appear in the Preamble. 25 Car. 2.

The Preamble distinguishes the King's Subjects into two sorts :

1. Some from whom there are great Dangers.

2. Those who are the Persons subject to those Dangers.

The Dangers are from Popish Recusants ; those who are threatened by those Dangers, the Act terms them his Majesty's good Subjects.

It would be needless to tell what those Dangers are, and whence they arise.

Dangers
from Papists

to the Prote-
stants.

All the times since the Reformation, have abundantly discover'd what the Dangers are. There have been a multitude of Acts of Parliament made that have still been fencing against those Dangers, which do sufficiently point them out : so do the frequent and incessant Addresses from every Parliament for many Years, setting forth the Dangers ; and all our Histories and Publick Writings, and especially those written and published by his now Majesty's Royal Grandfather, King James the First, and a multitude more, but above all, the sad event of things, and what we all see is come to pass ; these disclose to all the World, what the Dangers were, and the great need of a further Remedy.

Their destructive Principles, and their desperate Designs and Practices, do abundantly testify the Danger from the one sort, and the just fears of the other sort of Subjects.

The Scope therefore, and the great End that our Act of Parliament had, is to prevent the Dangers from the one, and to quiet the Minds of the other ; many former Acts of Parliament which had the same end and purpose proving ineffectual.

The Remedy provided is very suitable, and the likeliest and most effectual that either the Wisdom or Supreme Authority of the King and Parliament could devise, and the very Remedy points out the danger.

The Danger would be at the height of it, if the dangerous Principles and Practices should but arrive at the Power and Authority, and gain that into their hands, (and it was growing apace towards it).

The wise and proper Remedy therefore provided by the King and Parliament, is first to discover who are Popish Recusants ; to offer a Trial and Test to all that should be in any publick Trust and Authority, for it was suspected that there were many Papists under the disguise of Protestants.

And in the next place, so to Fence and Guard the Power and Authority and all Publick Trusts in the Nation, that they might by no means come into the hands of the Papists.

Persons entrusted with the Power and Authority over the Nation, had need give a signal Testimony of their Loyalty and Fidelity to the King and Government, and of their true Zeal for the Religion establish'd by Law.

The Test:

The Test, as to their Loyalty, are the two Oaths of Supremacy and Allegiance, (and neither of these are new Tests).

The Test, as to Religion, and the true Worship of God, are likewise two, the Receiving of the Blessed Sacrament, and the Subscribing a Declaration against the Doctrine of Transubstantiation.

The Temper and Moderation shewn by his late Majesty and both Houses, in this Act of Parliament, deserves to be observ'd : It is not like the *Leges Draconis*, written in Blood ; this is no Sanguinary Law. It does not proceed against them with Fire and Faggot.

It does not disturb them in their Estates and Possessions ; it does not deprive them of the Liberty of their Persons. Nay, it does not hinder them from the Exercise of their own Religion (if it may be so called) (I speak as to our present Act of 25 Car. 2. only).

It lets them live quietly in their Habitations, without so much as putting any Oath or Test upon them, so long as they live private men. It only requires, that if they will be entrusted with Power and Authority they should give some just and reasonable Security and Assurance,

rance, that they will be true to the *Religion* and the *Government* establish'd.

If they will be meddling with the Power, without giving such security, then at their Peril be it : The Law pronounces them incapable, and disabled, and inflicts Penalties upon such as shall presume to violate this Law.

And it is worth the noting, how solicitous and intent the Makers of this Law were, that this Test and Tryal might be taken and performed with great solemnity, and that the Law might not be eluded with any Arts and Tricks, that no Cheat might be put upon it. All this shews, that the Law-makers had great expectation from this Law.

The Oaths are to be taken in one of the two highest Courts of *Westminster-Hall* ; the very Hours of the Day are limited when they must be taken, that is when the Courts are usually fullest ; during the taking of them, all Pleas and Proceedings are to cease.

There is the like care taken concerning the receiving of the Sacrament, and of the certifying of it, and plentiful proof to be made of it, and then the recording of it. And the like for subscribing the Declaration against the Doctrine of Transubstantiation.

It were great pity, that after all these pains, they should signify just nothing, and that so high an Authority should be made ridiculous.

But after all this securing against the Danger from Popish Recusants, how shall we do to secure against the Danger of Dispensations ? Suppose this Act had contain'd a Clause in it, declaring, that all Dispensations and Grants, with *Non obstante's* to the contrary of this Law, should have been *ipso facto* void, and had inflicted Penalties upon such persons as should have procur'd them, would this have made it stronger ?

No : several Acts of Parliament have been made in divers Cases, with express Clauses incerted in those Acts, to make void all *Non obstante's* to the contrary of those Laws, (which one would have thought would have been strong enough) and yet they all came to nothing : for the Judges heretofore have resolv'd, that if the King grant a Dispensation from such Laws, with a Special *Non obstante* to any such Special Law, mentioning the very Law, that presently the force of that Law vanishes.

Therefore, beside the Disabilities and Incapacities put upon them, further to obviate this Mischief also, and to frustrate all contrary Judgments, and to prevent the Allowance of any such Grants and Dispensations with this Act, by the Opinion of the Judges, or future Resolution of any Court in *Westminster-Hall* to the contrary, (as if the Law-makers had foreseen this Danger too) and to give a Rule to Judges in such Cases, when any should happen to come before them,

There is this further Provision made by this Law, that the granting Judgment given by Parliament.
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It does not leave the Courts below to Judge it, but this Law beforehand gives the very Judgment. It directs the way of trying the Matter of Fact by Indictment, &c. and then declares the Judgment upon it, and leaves it only to the Judges to apply that Judgment to the particular Case.

May the Judgment of any Inferiour Court controul the Judgment of the Supreme Courts.

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May the Judgment of any Inferiour Court controul the Judgment of the Supreme Courts.

The Bishop
of Winchester's
Collections.

Here is more then a threefold Cord to tie it. An Oath, a Sacrament, a Declaration subscrib'd. I look upon the two Oaths as one Cord. And these two Oaths are so much alike, and to the same effect, that Cardinal *Bellarmino*, purposing to refute the Oath of Allegiance, by a gross mistake, bent all his forces against the Oath of Supremacy, not minding the difference. As King *James* the First, in his Answer to the Cardinal, hath observ'd in the Collection of his Majesty's Works, fol. 263.

The next Cord is the Sacrament. The third subscribing a Declaration, to remain on Record to all posterity.

And at last, a Judgment in the very point by the King and Parliament, (the supreme Court of the Nation) which must not be contradicted by any other Court, nor by all the Courts of the Nation put together; this Supreme Court exercises its Legislative and Judicial Power both at once, and shall it all at last be lost labour?

Of Law in
general.

Secondly, Having given an Account of this particular Law, upon which the present Case does arise, I shall in the next place briefly speak concerning Law in general, of what Force and Authority it ought to be, which will make way for those Arguments that I shall raise from it.

For when we know the true Nature of a Law, the Nature and Use of a Dispensation will be better understood.

The Name does oftentimes denote the Nature of a thing.

The truest derivation is that of *Lex à Ligando*, from its binding quality and the obligation it puts upon us; and this is most pertinent to the Matter in hand.

Laws made
by consent of
the People.

The Laws of *England* (as all just and righteous Laws) are grounded originally upon the Divine Law, as their Foundation or Fountain. The Supreme and Sovereign God among the Heathen is suppos'd to have the Name of *Jupiter quasi Juris pater*: But more immediately Humane Laws have their Force and Authority from the Consent and Agreement of Men.

All Publick Regimen, (says learned *Hooker* in his *Ecclesiastical Polity*) of what kind soever, seemeth evidently to have arisen from deliberate Advice, Consultation and Composition between Men. To live, says he, by one Man's Will becomes the Cause of all Mens Misery; this constrained Men to come to Laws.

A People whom Providence hath cast together into one Island or Country, are in effect one great *Body Politick*, consisting of Head and Members, in imitation of the Body Natural, as is excellently set forth in the Statute of *Appeals*, made 24 H. 8. c. 12. which styles the King the *Supreme Head*, and the People a *Body Politick*, (these are the very words) *compact of all sorts and degrees of Men, divided into Spirituality and Temporality*. And this Body never dies.

We our selves of the present Age, chose our Common Law, and consented to the most ancient Acts of Parliament, for we lived in our Ancestors a 1000 Years ago, and those Ancestors are still living in us.

The Law is the very Soul that animates this Body Politick, as learned *Hooker* describes it, the Parts of which Body are set to work in such Actions as Common Good requires. The Laws are the very Ligaments and Sinews, that bind together the Head and Members, without which this Body is but a Rope of Sand, or like the Feet of

Nebu-

Nebuchadnezzar's Image, Iron mixed with Clay, that can never cleave one to another, nor cement.

And so properly Laws have their name, à *Ligando*, in this respect too, viz. from knitting together, for as they bind by their Authority, so they unite in Affection and strengthen.

And these Laws are made by Publick Agreement, not impos'd upon Men against their Wills, but chosen by the Prince and People : They are (that I may express it in our familiar and ordinary Terms) the Articles of Agreement, chosen and consented to by Prince and People, to be the Rule by which all are to square their Actions. Hence the Law is term'd, *The Act and Deed of the whole Body Politick*. The Rule by which the Prince Governs and the Subject Obeys.

From whomsoever the Designation of the Royal Person is that governs, whether from Heaven or of Men, be it the one or the other, * The Consent and Agreement of the whole Body Politick, both Head and Members, is the Rule of the Government.

* *Grotius de Jure Bell. & Pacis*, f. 151.

David was made King by God's immediate appointment, yet he himself call'd all *Israel* together to *Hebron*, and there they made a *Covenant with him*†: This is that I am now speaking of, (*the Law of the Nation*) made by general consent; or a *Scheme* for the Government, as a late Lord Chancellor terms it in his *Survey of the Leviathan*. Every Just King in a settled Kingdom is bound to observe the *Paction made to his People by his Laws*.

† *King James the First* in his Speech to the Lords and Commons at *White-hall*, 1609. f. 531.

But nothing can more lively describe it then the Preamble of the Statute of 25 *Hen. 8. c. 21.* where the Lords and Commons addressing themselves in their Speech to the King, thus deliver themselves : Namely,

W Here this your Grace's Realm recognising no Superior under God, 25 H.8.c.21. but only your Grace, hath been and is free from subjection to any man's Laws, but only to such as have been devised, made and obtained within this Realm, for the Wealth of the same, or to such other, as by sufferance of your Grace, and your Progenitors, the People of this your Realm, have taken at their free liberty, by their own consent, to be used amongst them, and have bound themselves by long use and custom to the observance of the same, not as to the observance of the Laws of any foreign Prince, Potentate, or Prelate : but as to the customed and ancient Laws of this Realm originally establish'd, as Laws of the same, by the said sufferance, consents and Customs, and none otherwise.

Upon the same ground it is that learned *Hooker* says, that the lawful Power of making Laws to command whole Politick Societies of Men, belongs so properly unto the same entire || Societies, that for any Prince or Potentate of what kind soever upon Earth (I use his very words too) to exercise the same of himself, and not either by express Commission immediately and personally receiv'd from God, or else by Authority derived at first from their consent, upon whose persons they impose Laws, it is no better than meer (*Tyranny* *). *King James the First*, in his before-mentioned Speech, speaks much the same words.

|| *Leges nulla alia causa nos tenent quam quod judicio populi receptæ sunt.* *Ulpian de Lege*, 32.

Tim Demum Leges humane habent vim suam cum fuerint non modo institutæ sed etiam firmatæ approbatione Communitatis. *Sir Wal. Ral.* in his *Hist. of the World*, 245.

* *Fol. 531.*

Laws therefore (says *Hooker*) they are not, which Publick Approbation hath not made so. Approbation may be declar'd (says he) either

ther

ther by a personal Assent, or by others, by a Right deriv'd from them, as in Parliaments. This hath the more Authority, being the Judgment in a Point of Religion, not of an Historian or Lawyer, but of a Reverend Divine, and such an one as hath been so great a Champion for Authority and Government, and for exact Conformity to Ecclesiastical Laws.

Some of our late Writers and Preachers have discours'd quite in another strain. The Noble Author I just now cited, calls the Laws, Condescensions and Voluntary Abatements of the King's *Original Power*, (supposing his Power at first was absolute). Now that Preamble of that Statute which I just now read, is directly contrary in the very word (*Original*.)

Another, (a certain Lawyer, a Knight) in a finall, but bold, Treatise of his, will by no means allow of any limitation of Power, and holds it absurd, to say a Government can be mixed or limited.

A certain Divine and Geographer, in his History of the Life of a late Archbishop, declares himself much of the same mind with both these, and many others have trod since in their steps.

Mr. Hooker.

I therefore thought it very proper and seasonable, to shew the Judgment in these Matters of an *eminent Divine* too, a Person in all respects without exception, and his Judgment is concurring with all the ancient Authors in our profession of the Common Law, who being so learned and so ancient, are therefore the most Competent Witnesses of our *English* Constitution.

That ancient Author of ours, whose Book is stiled *Fleta quia in Cartere Fletæ de jure Anglicano conscripsit*, in the time of King Edward the First, (as learned Mr. Selden has noted in his *Dissertatio ad Fletam*, c. 10. sect. 2, 3.

Fol. 17.

This Author, L. 1. c. 5. tells us, *Superiorem non habet Rex in Regno nisi Deum & Legem. Per Legem factus est Rex temperent Reges potentiam suam per Legem. Non quod principi placet Legis habet potestatem. Non quicquid de voluntate Regis sed quod magnatum suorum Consilio Regia auctoritate prestante & habita super hoc deliberatione & tractatu recte fuerit diffinitum.*

Bracton, who was a Judge in the time of King Henry the Third, but wrote his Book in the time of King Henry the Second, stiles the Laws of *England*, the ancient Judgments of the Just. And *Briton*, Bishop of *Hereford*, who publish'd his Book 5 *Edw. 1.* by the Command of that King, and as written in the King's Name. And Sir *Gilbert de Thornton*, who was a Chief Justice in *Edward* the First's time, and reduced the Book of *Bracton* into a *Compendium*. And Sir *John Fortescue*, another Chief Justice, and afterwards Chancellor in the time of *Henry* the Sixth, writ all to the same effect, and almost *totidem verbis*.

These Authors discourse altogether of the *Imperia Legum*, as *Livy* calls it.

And Laws thus made by an universal consent, must needs be most equal, and have a far greater veneration paid them by all sorts of men.

The best men are but men, and are sometimes transported with passion.

The Laws alone are they that always speak with all persons, high or low, in one and the same impartial voice. The Law knows no favourites.

Hence it is, that *Aristotle* most significantly and elegantly says,
That

That the Law is a Mind without Affection; that is, it binds all alike, and dispences with none, the greatest Flies are no more able to break through these Cobwebs than the smaller.

Imperatoria Majestas Legibus armata est, says the Introduction to the Imperial Law, These are the surest Arms and Guard about a Prince. *Non eget Mauri jaculis nec Arcu.*

Baldus, the great Lawyer, says, *Digna vox est Majestate Regnantis Legibus alligatum principem se profiteri.*

Sir Edward Cook, in his 2 *Inst.* fol. 27. observes, that the Nobility of England have ever had the Laws of England in great reverence, as their best Birth-right, and so (says he) have the Kings of England, as their principal Royalty belonging to their Crown.

He there mentions our King Henry the First, (the Son of him that is stiled Conqueror.) He wrote to Pope Paschal in this manner :

Notum habeat sanctitas vestra quod me vivente (auxiliante Deo) dignitates & usus Regni nostri Angliæ non imminuentur. Et si ego (quod absit) in tanta me dejectione ponerem, Optimates mei & totus Angliæ populus id nullo modo pateretur.

And fol. 98. there is mention of the Letters which all the Nobility of England, by assent of the Commonalty, in the time of Edward the First, wrote to Pope Boniface, viz. *Ad Observationem & Defensionem consuetudinum & Legum Paternarum ex Debito prestiti Sacramenti astringimur quæ mantenebimus toto posse totisque viribus (cum Dei auxilio) defendemus.*

Nec etiam permittimus aut aliquatenus permittemus tam insolita indebita prejudicialia & alias in audita Dominum nostrum Regem (etiam si vellet) facere seu quomodo libet attemptare : Sealed with the several Seals of Arms of 104 Earls and Barons.

And the Noble King Edward the First took no offence at the stout and resolute penning of this Letter : but wrote himself to the Pope to the same effect.

And yet it contains in it a kind of a *Non obstante* to what the King should do by way of submission and compliance with the Pope.

Nor is a Just Law any restraint to a Just Liberty, it rather frees us from a Captivity and Servitude, viz. to that of our Wills and Passions. It is true, this obligation and binding of the Law is very uneasy to such Men as will be slaves to their Lusts and Appetites.

They cry out, let us break these Bonds asunder, and cast away these Cords from us ; but to such as are virtuous and just and pious, the Laws are a Direction and Protection.

The Orator truly says, *Legum idcirco omnes servi sumus ut liberi esse possimus.* The true English of which is, that such service is perfect freedom. Hence our English Laws in *Magna Charta* are called Liberties. *Concessimus omnibus hominibus regni nostri has libertates subscriptas,* (says King Henry the Third, in the first Chapter of *Magna Charta*) which Sir Edward Cook expounds to be meant of the Laws of England ; *quia liberos faciant,* (says he).

And tho' this Statute of *Magna Charta* run in the stile of a Grant from the King, in the word *concessimus*, for the honour of the King ; yet as he says, they were the Common Laws and Rights of the People before, and it was made by the King, Lords and Commons, as is recited by the Statute of 15 Ed. 3. c. 1.

Thus it appears what the true Nature and Properties of a Just Law are ; of how great Force and Authority a Law ought to be ; how dear and precious Laws have been heretofore to Prince and People, and whence they have their Birth and Original.

The original
of Dispensa-
tion.

Thirdly, I come now to that Notion or Invention of a Dispensation, the Power of relaxing or dispensing with a Law, and enquire into the Original and Nature of it, and the great Mischief that hath arisen from it.

The Pretence for the Use or Need of a Power of Dispensing is this, viz. There is no Providence or Wisdom of Man, nor of any Council of Men, that can foresee and provide for all Events and variety of Cases, that will or may arise upon the making of a new Law.

But a new Law may sit heavy upon some particular persons, or in some extraordinary Case that may happen, let what care can be taken in the penning of it.

It is enough to commend a Law, if it be beneficial to the greater number, and be for the publick good ; Laws are fitted *Ad ea quæ frequentius Accidunt*, and not for rare and extraordinary Events and Accidents, as the *Romans* had no Law against Parricide.

And the Law says, better is a Mischief than an Inconvenience.

By a Mischief is meant, when one Man or some few Men suffer by the hardship of a Law, which Law is yet useful for the Publick.

But an Inconvenience is to have a Publick Law disobey'd or broken, or an Offence to go unpunished.

Now from this suppos'd and imaginary defect of Law, or some particular mischief or hardship sometimes (tho' very rarely) happening to some Men, which hardship was not foreseen by the Makers of the Law, (altho' this is oftner pretended and feigned then hapning in truth) occasion hath been taken to assert a Power in the Prince or chief Ruler, to dispence with the Law in extraordinary Cases, and to give ease or relaxation to the person that was too hard bound or tied to a Law ; for, as I observ'd before, the Law is of a binding and restraining nature and quality, It hath the same specious pretence as a Law made 31 H. 8. c. 8. had, which was of most desperate and dangerous consequence, had it not speedily been repealed by the Statute of 1 E. 6. c. 12.

The Title of that mischievous Act of 31 H. 8. is this : *An Act that Proclamations made by the King's Highness, with the Advice of the Honourable Council*, (meant of the Privy Council) *shall be obey'd and kept as tho' they were made by Act of Parliament.*

The Preamble recites the King, by Advice of his Council, had then- tofore set forth fundry Proclamations concerning Articles of Religion, and for an Unity and Concord to be had among his Subjects, which nevertheless many froward, wilful and obstinate persons, have wilfully contemned and broken, not considering what a King by his Royal Power may do : and for lack of a direct Statute and Law to coerce Offenders to obey those Proclamations, which being still suffered, should encourage Offenders to the disobedience of the Laws of God, and sound too much to the great dishonour of the King's most Royal Majesty, (who may full ill bear it.)

Considering also, that sudden Occasions fortune many times which do require speedy Remedies, and that by abiding for a Parliament, in the mean time might happen great prejudice to ensue to the Realm :
and

and weighing that his Majesty (which by the Regal Power given him by God, may do many things in such Cases) should not be driven to extend the Supremacy of his Regal Power, by wilfulness of froward Subjects : It is therefore thought necessary, that the King's Highness of this Realm for the time being, with the Advice of his Council, should make Proclamations for the good Order and Governance of this Realm of *England, Wales*, and other his Dominions, from time to time, for the Defence of his Regal Dignity, as the Cases of Necessity shall require.

Therefore it is enacted, that always the King, for the time being, with the Advice of his Council, whose Names thereafter follow, (and all the great Officers of State are mentioned by the Titles of their Offices only) for the time being, or the greater number of them, may set forth at all times, by Authority of this Act, his Proclamations, under such Penalties, and of such sort as to his Highness and his Council, or the more part of them shall seem requisite. And that the same shall be obey'd, as tho' they were made by Act of Parliament, unless the King's Highness dispence with them under his Great Seal.

Here, at one blow, is the whole Legislative Power put into the King's hands, and there was like to be no further use of Parliaments had this continued.

Then there follows a Clause, that would seem to qualifie and moderate this excess of Power, but it is altogether repugnant and contradictory in it self.

And the Conviction for any Offence against any such Proclamation, is directed not to be by a Jury, but by Confession or lawful Witness and Proofs.

And if any Offender against any such Proclamation, after the Offence committed, to avoid the Penalty, wilfully depart the Realm, he is adjudged a Traytor.

And the Justices of Peace are to put these Proclamations into execution in every County. And by another Act of 34, and 35 *H. 8. c. 23*. Nine of the Great Offices are made a *Quorum*, &c. for they could not get half the number to act under it.

The Act of 1 *E. 6. c. 12*. (which repeals the terrible Law) begins with a mild and merciful Preamble, and mentions that Act of King *H. 8*. which as this Act of *E. 6*. does prudently observe, might seem to Men of Foreign Realms, and to many of the King's Subjects, very strict, sore, extream and terrible; this Act of King *E. 6*. does therefore, by express mention of that Terrible Act, wholly repeal it. And so that Law (to use the Lord *Bacon's* phrase) was honourably laid in its Grave.

And God grant it may never rise again.

It is very probable, that this Terrible Law was drawn by King *Henry* the Eighth's own hand, by that expression in it, *that the King may full ill bear the Disobeying of his Proclamations*, and the dishonour done to him by it; and by several other Clauses. The History of the Reformation, fol. 262. mentions the Draught of a Bill intended for an Act of Parliament, concerning giving the King Power of Erecting many new Bishopricks, by his Letters Patents; upon which the Author of that History says, that the Preamble, and material parts of it, were drawn by King *H. 8*. himself, and the first Draught of it, under his hand, is still extant; and this passed the Lords, and was sent down to the

the Commons : and this is the very same Parliament of 31 H. 8. when this terrible Law passed.

*Dispensation
Defined by E.*

Sir Edw. Cook, in his first *Inst. fol. 99.* defines a Dispensation thus : *Dispensatio est mali prohibiti provida relaxatio utilitate seu necessitate pensata.*

So that great utility, or necessity, are at least pretended for the granting of them ; now publick utility and necessity are the true grounds and foundation of all Laws, (which I have already shewn, bind all Men alike, without respect of person) But a Dispensation does untie that Knot, or slackens and lets loose that Obligation, as to some particular persons, and in some cases, and for some limited time, at the will and pleasure of the Prince that exercises that Power.

It looks like a Dispensation which *Naaman the Syrian* obtained from the Prophet *Elisha*. In this thing (that is in one particular) the Lord pardon thy servant to bow down himself in the house of Rimmon, when his Master the King did so. He calls it a Pardon, but it rather was an Indulgence or Dispensation that he crav'd. A Pardon is properly of an Offence already committed. See Dr. *Field*, Dean of *Gloucester*, in his Treatise of the Church, printed at *Oxford*, 1628. fol. 475. what a Dispensation is, viz. It is in respect of certain persons, times, places, and conditions of men and things. So that a Dispensation, permitting the Law to retain her wonted Authority, only freeth some particular person or persons, at some times in some places, and in some condition of things from the necessity of doing or leaving undone that which (unless it be in consideration of such particular circumstances) ought to be done.

A Dispensation is of a thing future, to allow of a thing to be done, that it may not be accounted for a Crime, and makes the thing prohibited lawful to be done. And thereupon the Chief Justice *Vaughan*, in his Argument of the Case of *Thomas and Sorrel*, seems to take it in its right Notion, when he says a Dispensation obtain'd, does *Jus dare*. Tho' he quarrels with Sir *Edward Cook's* Definition of it, and says, it is *Ignotum per Ignotius*. But, under his favour, if he dislik'd that, he should have given us a better. *Carpere vel noli nostra, &c.*

1. I know very well, that there are some of late, that do ground this Power upon the Sovereignty of the Prince, as if to be Sovereign, and to be Absolute, and *Solutus à Legibus*, were one and the same thing. As if it were inconsistent for a Sovereign Prince to be bound to Law.

A Prince may be a Sovereign, *i. e.* no subordinate or subject Prince. *Rex est qui Regem Maxime not habeat*, and yet not absolute and unlimited in Power. It is a frequent Argument, and often disputed in our Books, what Law the King is bound to, and where he is not included in the Law.

2. It hath been argued, that because the Laws are the King's Laws, that therefore the King may dispence with the Laws : this Argument is of a vast extent in the consequence, as that of the Sovereignty is. But it is not the King alone that makes the Laws, and tho' they are indeed his Laws *per Eminentiam*, and *Denominatio sumitur à majore*, yet others have an hand in the making our Laws, and a Propriety and Interest in them when once they are made.

We shall be best instructed in the Use and Nature of a Dispensation, if we give some Instances of particular Cases, wherein Dispensations have been

been allowed good by our Judges, against the Penalties of some particular Acts of Parliament. For example,

By a certain Statute, *Gascoign* Wines and other Foreign Goods were prohibited to be imported into this Kingdom, but in *English* Ships, under the penalty of forfeiting the Goods, and it was a profitable Law for the encrease of our Navy and employment of our own Mariners, wherein the strength and safety of the Kingdom is concerned. This importing of Foreign Goods in Foreign Ships was the *Malum*, but it was only *Malum prohibitum*; that is, it was no offence till the Law made it so. It was not *Malum in se*. It was therefore resolv'd by all the Judges, 2 R. 3. fol. 12. that the King might dispence with this Law, *Cum Clausula non obstante*, and might give Licence to some particular persons to import such Foreign Goods in Foreign Ships. Instances of Dispensation.

That which before this Act of Parliament was a common Liberty and Trade, by occasion of this Law, applying the Prerogative of dispensing to it, was now engros'd into some few hands, from whence a Revenue it's likely was rais'd; so that it might be said, Sin took occasion by the Law.

By the Statute of 17 R. 2. c. 5. no Aulnager or Weigher of Wool shall have any Lease for Life or Years of his Office, and if any Charter or Letters Patents be made to the contrary, (the Statute says) they shall be null and void: so that the Makers of this Law did not allow of any Dispensing Power, but provided against it, which shews what Opinion a Parliament hath of Dispensations. Yet it was resolv'd, *Dyer* 303. that the King, by a *Non obstante*, might dispence with this Law. The Judges indeed were of that Judgment, but the Parliament, who are the supreamest Judges, plainly appear to be of a contrary judgment.

By a Statute made 1 H. 4. he that petitions to the King for Lands, &c. in his Petition is to mention the Value of the thing, &c. or else the King's Letters Patents, &c. shall be of no effect: and yet Letters Patents to the contrary, are good with a *Non obstante*.

By the Statute of 33 H. 8. c. 24. for avoiding Partiality and Favour in administering Justice, no man is to exercise the Office of a Judge of Assize in the County where he was born or dwells, under 100 l. penalty; and divers former Acts had been made to the same purpose, as 8 R. 2. c. 2, &c. yet this we know is frequently dispenc'd with by a special *Non obstante*; so that these Statutes are seldom or never observ'd, and are of little use. So likewise is the Statute of 7 Ed. 6. c. 5. for Retailing of Wine, according to the Resolution in the Case of *Thomas and Sorrel*.

These may suffice to shew what is meant by the Term *Dispensation*, and what the Nature of a *Non obstante* is.

It is an Indulging of a Privilege to some particular Person, or to a Corporation, allowing him or them to do a thing that is prohibited by some Act of Parliament, (under a Penalty) without incurring the Penalty. The Definition of a Dispensation.

The Chief Justice *Vaughan*, who argued in his turn the last but one of all the twelve Judges, in the late great Case of *Thomas and Sorrel*, (and there was hardly a Case in all the Books under that Title, but what had been cited by one or other, and all the Rules and Distinctions were there remembred) yet that Chief Justice, after all, says, that not

one steady Rule had been given either by the Books, or any of the Judges, (that argued before him.) And for that trite Distinction, so generally used of *Malum in se* & *malum prohibitum*, the Chief Justice *Vaughan* professes, that Rule hath more confounded mens judgments than rectified them : yet he himself gives us no other.

Which shews, that the Notion of *Dispensation* is not very ancient with us in our Law, and is but rare, and as yet unform'd, not licked into a perfect shape, (I mean still Dispenfations with some Acts of Parliament, such as this of 25 *Car. 2.* not the granting *Non obstante's* as to misrecitals or non-recitals in Grants of Lands, &c.)

It having yet no steady Rule, and yet being frequently used, it is the more fit for the Supreme Court to give some certain Rule in it, that may regulate and guide the Judgment of Inferiour Courts : and this is the proper work of the King and Parliament.

And because we find it a growing Mischief, and getting ground upon the Law, and every day brings forth new Precedents, it is high time that a stop were put to it.

So much for the Nature of a Dispensation.

The Original of Dispensation.

I shall in the next place endeavour to trace out the Original of this Invention of a Dispensation, when it first began, and who was the Author of it, and shew, that it was look'd upon as a Monster, and exclaim'd against by Kings and States and all Good Men, and yet the Precedent was followed, and the Abuse of it spread and increas'd, and hath been ever since growing.

* *Marsilius Patavinus*, in the 14 Cent. (of *Padua*) in his *Defensor pacis*.

I am not the first that have undertaken to make this discovery : In the Argument of the Case of *Comendam*, in Sir *John Davy's* Reports, fol. 69. b. It is said, that the *Non obstante* was invented and first used in the Court of *Rome*, and they bring an * Author that denounc'd a Woe against that Court, for introducing so ill a Precedent, mischievous to all Common-wealths in Christendom ; for the Temporal Princes perceiving the Pope to dispence with his Canons, in imitation of him, have used it as a Prerogative to dispence with their Penal Laws and Statutes, where before they caused their Laws to be religiously observ'd, as the Laws of the *Medes* and *Persians*, which might not be changed. Thus says that Report : Here we see from whence 'twas borrow'd.

The late Chief Justice *Vaughan*, in his Report of the Case of *Thomas and Sorrel*, fol. 348. does acknowledge, that the use of Dispenfations was principally derived to us from the Pope.

Its Antiquity.

Now, to make some conjecture about what time it began, that we may discover how old it is, and which of the Popes was the Author of it.

|| Dr. *Barron* of the Pope's Supremacy, 316.

See there the unreasonableness of Dispenfations.

† *Anno 1215*.

The History of the Reformation, fol. 101. says, this Power of Dispensing with the Laws of the Church by the Popes, was brought in, in the latter Ages. Popes *Zozimus*, *Damasus*, *Leo*, || and *Hilarius*, do freely acknowledge they could not change the Decrees of the Church.

It is suppos'd, it was first invented by Pope *Innocent* the Third, about the beginning of the thirteenth Century, and about the times of our King *John*, and his Son King *Henry* the Third ; and it is observable, that in this Pope's time the Doctrine of Transubstantiation was first decreed to be an Article of the Faith, and this at the Council of † *Lateran* : that Doctrine, which by this very Act of ours, is to be declar'd against, and

and is now dispens'd with. This is that Pope that excommunicated *Orto* the Emperour, and our King *John*, and forced him at last to resign his Crown, and to take it back from him again to hold it of him at the Rent of 1000 *Marks*: What good issue can we expect from such a Father?

After the time of this Pope, Dispensations began more frequently to be practis'd by the Successors of *Innocent* the Third, by *Honorius*, and by Pope *Gregory* the Ninth, and *Innocent* the Fourth, but they were exclaim'd against by all Kings and Princes, and by all the good and learned Writers of that Age, which shews, that they had not been ancient, and that the Kings and Princes themselves had not then followed the ill example in Dispensing with their Laws; for had they done so, they could not with any confidence have condemn'd the Pope for using them.

And we may see how odious these Dispensations were, by the vile Epithites the Learned and Good Men of that Age gave them.

We have a full Relation of it from one of their own Order, a Monk, but an Historian of very good esteem, that is, *Matth. Paris*; he tells us, that our King *Henry* the Third sent Earl *Bigod* and other Nobles to the Council at *Lyons*, and amongst others, one *William de Powic*, one of his Procurators and a Clergy-man, who made an Elegant Oration, ripping up the horrible Oppressions used by the Pope upon *England*, and then deliver'd in an Epistle, directed to Pope *Innocent* the Fourth, by the *Magnates & Universitas Regni Angliæ*, to the same effect. After this had been openly read in the Council, and a mighty silence followed, and the Pope gave no answer to it. The King's Proctors, *Prioribus addebant querimoniam gravem & seriam videlicet de violenta Oppressione, intolerabili gravamine, & impudenti Exactione, & injuria, quæ per hanc Invisam Adjectionem papalibus Literis frequenter insertam* (Non obstante) *&c. exercetur per quam Jus pro nihilo habetur & Authentica scripta Enervantur*, says that Historian.

The same Author says, that the Reformation of many things was obtained from Pope *Innocent*: *Sed omnia hæc & alia, per hoc Repagulum* (Non obstante) *infirmantur ubi vero fides! ubi jura, quæ scriptis solebant solidari?*

Our King *Henry* the Third conven'd his Parliament, and spread before them the Articles of the Grievances which he had so sent to *Rome*, and amongst others one in these words: (*viz.*) *Gravatur Regnum Angliæ ex multiplici adventu illius infamis nuncii* (Non obstante) *per quem Juramenti religio, consuetudines Antiquæ, scripturarum vigor, concessionum autoritas, Jura & privilegia debilitantur & evanescent.* *Mat. Paris, p. 677.*

We find it frequently termed (*Detestabilis Adiectio Non obstante*) and we find the form of his Dispensation running in these words: *viz. Indulgentia quâcunque vel privilegio quolibet, aut Constitutione in Generali Concilio edita, Non obstante.*

The Pope afterwards required a third part of the Goods of all benefited Clerks, and (says that Historian) *Multis adjectis durissimis Conditionibus*; and (amongst other) *per illud verbum & adjectionem detestabilem* (Non obstante) *quæ Omnem Extinguit Justiciam.* *

* Sir Robert Cotton's Abridgment of

the Records of the Tower, amongst the Petitions of the Commons, 51 E. 3. Numb. 62. Dispensations from *Rome*, are said to be the chief Grief.

In another Bull he requires the payment of a Sum of Mony from the *English* Clergy, *Quocunq; Privilegio seu Indulgentia Non obstante, Licet presentes expressam de ipsis non faciant Menconem.* This very Phrase is grown most familiar in Letters-Patents with us, and we see from whence it has been borrowed.

That Temporal Princes at that time did not practise the like, does evidently appear, not only by their frequent Complaint of them; but the Historian tells us, It was then grievously feared, that the Kings and Great Men would in time be infected with the ill Example of the Pope: his words are, *Quod multi formidabant vehementer. Ne Principes Laici & Seculares exemplo Papæ Edocti Non obstante talis, vel talis Chartæ tenore:* would revoke their Concessions too. Therefore as yet it was not in practice by Temporal Princes, no not in Letters-Patents, much less in Laws.

I shall give one instance, wherein we shall find the Pope teaching this very Lesson to the King of *England*, (K. H. the 3d) and instructing him as his Schollar, to write after his Copy.

King H. the Third had made several Grants to his Subjects (Bishops, Noblemen, and others) and had oblig'd himself by Oath never to revoke them.

Prin's Second Tome.
Fol. 504.

Pope Gregory the Ninth, by his Bull, (which Mr. Prin (who had the keeping of the Records in the Tower) says he found in the White Tower, under Seal) the Pope commands the King to revoke these Grants, *Juramento & Instrumentis predictis nequaquam obstantibus.*

Ibidem, 760.

King Henry the Third was easily taught this Lesson, and did soon put it in practice; and being reprov'd by some about him, for using of *Non Obstantes*, the King justified himself by the Example the Pope had given him: *Nomine Papa* (says he) *facit similiter, subjungens in Literis suis manifeste Non Obstante aliquo Privilegio vel indulgentia.* But as yet it was not exercised as to Acts of Parliament, till a long time after.

What sad Apprehensions it rais'd in good Men, may appear by an Example or two: When one of these Patents with a *Non Obstante* in it, was produc'd in the Courts of *Westminster*, one Roger de Thurkeby, (who was a Judge of the Court of Common Pleas, in the time of King Henry the Third) upon the hearing of it (says the Historian) *Ab alto ducens suspiria* (he fetcht a deep sigh) and, *De predictæ adjectionis appositione:* That is concerning this Clause or Addition of *Non Obstante.* *Dixit heu! heu! hos ut quid dies expectavimus ecce jam Civilis Curia exemplo Ecclesiasticæ Coinquinatur & a Sulphureo fonte Rivulus intoxicatur.*

This plainly shews the time when the use of them was first introduced into *England* in Civil and Temporal Cases, they were not used before the time of King Henry the Third, which is not ancient enough to make a Prescription by the Rules of our Law, and we see from whence they learnt it.

I shall now cite the Judgment of a Famous and Learned Bishop of those times, concerning these *Non Obstantes*: that of Robert Grosstest, or Greathead, who *per excellentiam*, was generally stild no more, but (*Lincolniensis*) in the Book of his that is Entitled, *De Cessatione Legalium*, Publish'd by the late Dean of *Windfor* (Dr. Reeves): There are some Testimonies given of the Bishop, out of Authors in the beginning of that Book: Among others, it is remembred of him that he sent a smart Epistle to the then Pope, wherein he does cry out upon the Pope, for that the Pope's Bulls did superaccumulate (as he terms it) the words (*Non Obstante*)

Innocent 4th.

stante) which words, says that good Bishop of *Lincoln*, did, *Christianæ Religionis puritatem & hominum tranquillitatem perturbare*: And he does thereupon affirm the Pope to be Antichrist: *Nonne* (says he) *Antichristus merito dicendus est*? And to prove him to be Antichrist, he further charges him: *Privilegia Sanctorum Pontificum Romanorum prædecessorum suorum Papa impudentur annullare, per hoc Repagulum (Non Obstante) non erubescit, sic diruit, & Reprobat, quod tanti & tot Sancti ædificarunt.*

When *Innocent* the Fourth read this Bishop's Letter, he fell a swearing by *Peter* and *Paul*, that he would Confound him: *In tantam confusionem præcipitaret ut totius mundi fabula foret, stupor & prodigium*: And that he would command the King of *England*, (whom he there insolently term'd, *Noster Vasallus*, (a Tenant, or Vavaler): *Et ut plus dicam Mancipium* (his Property) *illum nutu nostro in carcerare.*

But the Cardinals then about the Pope, advis'd him to consider better of it; for (said they) *Ut vera fateamur vera sunt quæ dicit, Catholicus est, imo & Sanctissimus.*

Of this Bishop (says *Mr. Camden* in his *Britannia*) he was, *Terrificus Papæ & Regis Redargutor manifestissimus, & veritatis amator.* *Henry de Knighton* adds this of him: *Ad Innocentium Papam misit Epistolam satis tonantem, (a thundring Epistle) qua de re ad curiam vocatus & Excommunicatus appellavit a Curia Innocentii ad Tribunal Christi.*

And this Ufurped Power, tho' us'd with more modesty at first, yet in a short time it grew to that heighth, that it prov'd intolerable and insolent.

The Bull of Pope *Pius* the Fourth, publishes Decrees, *Non obstantibus Constitutionibus & Ordinationibus Apostolicis.*

Another Dispensation of the same Pope's runs in these words, *viz. Licet Christus post cænam instituerit sub utraq; Specie Panis & Vini Venerabile Sacramentum; tamen hoc Non Obstante, &c.* The Pope takes upon him to Dispense with that Sacred Institution: *A conscientibus* (for so he prophanely expresses it) *sub utraq; & a Laicis tantum modo sub Specie Panis suscipiatur.*

In the *Oath of a Bishop to the Pope (extant in the *Roman Pontifical*, set out by Pope *Clement* the Eighth) the Bishop upon his Oath doth acknowledge amongst other *Regalia Petri*, That the Pope can make void Promises, Vows, Oaths, and Obligations to Laws, by his Dispenfations.

* Dr. Barrow
in the Pope's
Supremacy.
31.

Dr. Marta de Jurisdictione affirms, That *Papa de Plenitudine potestatis potest Dispensare contra jus Divinum, & contra Apostolum, est super omnia Concilia, quæ interpretatur, tollit & Corrigit.*

The Glossator upon the Canon Law (avowed by the *Rota* of *Rome* (as the History of the Council of *Trent* does quote him) holds the Pope can Dispense against the Old Testament, and the Four Evangelists, and against the Law of God.

Bishop *Jewel*, in his Defence of *The Apology of the Church of England*, against *Harding*, brings in one of their Canonists that holds, That the Pope, *Privilegium dare potest contra jus Divinum, Papa Dispensare potest de Omnibus preceptis veteris & Novi Testamenti.* It is part of the Description given of Antichrist, by the Prophet *Daniel*, chap. 7. He shall think that he may change Times, and Laws, and they shall be given in to his hands.

Bishop *Jewel's* Exposition upon the Epistle to the *Thessalonians*, fol. 131. Antichrist (says the Bishop) is there called *O. Anomos*, a Man without Order or Law, that Man of Sin; which is one of the peculiar Notes of

Antichrist. He shall seek to be free and go at liberty, he shall be tied to no Law neither of God nor Man. Hence it is said of the Pope, that he is *solutus omni Lege humana*. *In iis que vult, est ei pro ratione voluntas nec est qui dicat illi, Domine cur ita facis? Ille potest supra jus, dispensare & de Injustitia facere justiciam Corrigendo jura & mutando.*

Pope *Martin* the Fifth dispens'd with a Man that married his own Sister.

L. 3. c. 3. sect. 10. In this last Instance the Pope did directly write after the Copy of an Heathen King. The story of *Cambyfes* is the same Case in the very point with this last of Pope *Martin*. Sir *Walter Raleigh* mentions it in his History of the World. *Cambyfes* inquir'd of his Judges whether there were any Law among the *Persians*, that did permit the Brother to marry his own Sister. It was the intent of *Cambyfes* to marry his own Sister too. The Judges (who as Sir *Walter Raleigh* observes) had either Laws or Distinctions in store to satisfy Kings and Times, they make a subtil answer, that there was not any thing written allowing any such marriage: But they notwithstanding found it in their Customs, that it was always left to the Will of the *Persian* Kings to do what best pleas'd themselves. This was a *Non obstante* with a witness.

Fol. 39.

This surely, and the Popes practice together, gave the occasion to Mr. *Chillingworth's* observation. He that would usurp (says he) an absolute Lordship over any People, need not put himself to the trouble of abrogating or disannulling the Laws made to maintain the Common Liberty, for he may frustrate their intent, and compass his design as well if he can get the power and authority to interpret them as he pleases, and to have his Interpretations stand for Laws. If he can Rule his People by his Laws, and his Laws by his Lawyers; therefore (says he) there is a necessity of a frequent resort to be had to the Law-makers, not only to resolve Difficulties of Judgments, but to keep the Power of Interpretation within its due bounds; which is excellent advice.

I shall give but one Instance more, and that is of the most impious sort of Dispensations that could possibly be devised; I find it in the History of the Church of *Scotland*, written by Archbishop *Spotswood*. He tells us, that in *Anno* 1580. Dispensations were sent from *Rome* into *Scotland*, whereby the Catholicks were permitted to promise, swear, subscribe and do what else should be requir'd of them, so as *in mind* they continued firm, and did use their diligence in secret to advance the Roman Faith.

Thus we see the monstrous Abuses brought in by Dispensations: I have been something long upon this Subject, but it was necessary to shew how that it is in the very nature of it, to be stretching and growing, and at last to be altogether unlimited, and will totally subvert the Law.

Having thus laid my Foundation, I shall now proceed from thence to raise my Arguments against Dispensations in general, to prove, that they are not Law, but indeed contrary to Law and destructive of it.

I hold there is no just nor lawful Power of Dispensing with any Act of Parliament, in any other hands than in those that are the Law-makers, that is, in the King and Parliament in conjunction: (I confine my self to Dispensations with Acts of Parliament.)

1. My first Argument shall be from the Nature of a Law, (whereof an Act of Parliament is the highest and of greatest Authority.) A Law hath its Name (as I said before) from its Nature, *Lex à Ligando*, it binds and compels to Obedience, and it binds together and cements, it knits and unites a multitude of People, and makes them all as it were but one body.

Now a Dispensation is of a quite contrary nature, and is destructive of Law: As the Law does *Ligare*, a Dispensation does *Relaxare*. It is defin'd to be, *Relaxacio Juris*: it does unbind and set loose the Obligation of the Law, and by consequence tends to the dissolving of the Body Politick. Whatsoever is destructive of the Law cannot it self be Law; for then the Law would be *felo de se*, *Lex quæ Leges evertit ipsa Lex esse non potest*, a thing divided against it self, and therefore will not stand. *Ubi non est pudor, nec cura juris, instabile Regnum est*, (says *Seneca*.)

Law is made by an universal consent and agreement of Prince and People.

I have already shewn, how that the Common Law (which is as ancient as the Nation it self) is that Covenant which was agreed upon by Prince and People at the first framing and institution of the Government.

The Statute-Law hath its Force and Authority from the like consent, and nothing is Law without that consent, as appears by the Preamble of 25 H. 8. c. 21. concerning the very Point of Dispensations; Sir John Fortescue says, *Rex leges sine subditorum assensu mutare non potest; potestas regia lege cohibetur*, in his Book *de Laudibus legum*, &c.

Now for the Prince alone, without the like consent, to depart from that Agreement, and at his will and pleasure to break any Article of it, is in effect to put the sole Power of the Law into the hands of one person, which receiv'd its force and vigour from the consent of all, which is irrational.

* *Bracton*, who, as Sir Edward Coke says, in his Preface to the Ninth Report, was a famous Judge of the *Common Pleas*, in the time of King Henry the Third, is of this Judgment, *Leges* (says he) *cum fuerint approbatæ consensu utentium & Sacramento Regum confirmatæ, mutari non possunt nec destrui sine Communi consensu & Concilio eor' quor' concilio, & consensu fuerint promulgatæ.* * Sir Ed. Coke 2 Inst. 27. No Law or Custom of England can be annul'd but by Act of Parliament.

2. The Laws of England (both Common and Statute Law) have (as I have already shewn) a different Original from that of the Power of Dispensation (as it is exercis'd now among us) they have not the same Father. The King, (who is *Pater Patriæ*) with the consent of the People, is the Father of our Laws, he is *Juris Pater*: but he that is called the holy Father, and from thence hath his name of Pope, is the Father and first Inventer of Dispensations: so that there is no kindred nor affinity between the Law and Dispensation.

3. The Laws amongst us and this faculty of Dispensations, as they have a different Original, so they have no resemblance one of another: *facies non omnibus una est*, they have contrary qualities and dispositions. The Law is equal and impartial, and hath no respect of persons, and (as before I observ'd from *Aristotle*) is a Mind without Affection. Now the nature of a Dispensation is to favour some, to set some at liberty from the obligation of the Law, and is a kind of præterition of others, leaving them still under the tie and obligation, and obnoxious to the penalty

Penalty if they transgress. Whereas, in a well govern'd Kingdom there ought to be *Unum pondus*, and *Una Mensura* in distributive, as well as commutative Justice.

It was part of the Oath that was taken by King *William* the First, (who is commonly stiled the Conquerour) that he would, *Æquo jure Anglos & Francos tractare*: Which Oath favours nothing of a Conquest, nor does it run in the stile of a Conquerour.

And it is the Oath of a Judge at this day, That he shall truly serve the King and his People, &c. That he shall do Right to every Person, notwithstanding the King's Letters, that is, notwithstanding any (*Non Obstante*).

It is a Maxim in Law, *Quo modo aliquid Ligatur, eo modo dissolvitur*.

Fol. 775.

Now a Law being made by Consent of all, should not be Dissolv'd again, but by the like Consent; that is, by Authority of the King and Parliament, who have the Legislature. Dr. *Willet* in his *Synopsis Papismi*, makes a Difference between a Toleration, and a Dispensation: That of *Moses*, in case of Divorces was a Toleration. A Dispensation (says he) must be of as high a Nature as the Institution: None but the Law-Maker, can Dispence with the Law, not he that hath but a share in the Legislature.

The King and Parliament have the Power of Dispensing.

And from hence I shall take occasion to assert, and shall endeavour to make good my Assertion by Law, that the Lawful Power of Dispensing with an Act of Parliament, that concerns the Publick, is only in the hands of those that have the Legislative Power. I confine my self to such Acts only as concern the Publick (as the present Act we have now to do with, does in a very high degree). And therefore I hold that none can Dispence with such a Law, but the King and Parliament, and such as they entrust with it.

The Statute of Dispensation.

I shall begin to prove this by an Act of Parliament, which is the highest Resolve and Authority in our Law: It is in the Preamble of the Act of 25 *Hen. 8. c. 21.* (the Statute of Dispensations) and the Preamble of a Statute is Law, as well as the enacting part, or body of the Law. It is in effect a Declaration of what was Law before, at least it shews the Opinion and Judgment of the Law-Makers; which is of high Authority.

The Preamble.

It first utterly disowns and renounces the Pope's long usurped Claim and Pretence of Dispensing with any Person within this Realm, even in Matters Spiritual, tho' by him practis'd for many Years. I desire to observe upon this, that long usage by an Usurpation, gives no lawful Right: But I would further observe too, that where it hath been long admitted and used, it is in such Case reasonable for none but the Supream Court to undertake it, and declare against it.

In the next place, this Act of Parliament does affirm, That this Realm of *England* is subject to no Laws, but such as have been made and taken by sufferance of the King and his Progenitors, and the People of this Realm, at their free Liberty, by their own Consent to be used amongst them, and have bound themselves by long Use and Custom, to the observance of them, as to the customed and ancient Laws of this Realm *Originally* establish'd, as Laws of the same, by the said Sufferance, Consents, and Customs, *And none otherwise*. This shews the Original of our Common Law. This likewise clearly proves, that whatever is imposed upon the People without their Consent, hath not the Authority of a Law: And it cannot be shewn that ever the People did consent

consent to this Power or Practice of Granting Dispensations. But it plainly appears that our Acts of Parliament are so far from approving or countenancing of it, that they have often fenced against it, altho' in vain hitherto. And tho' the Usage have been very Ancient (as I have shewn) yet that gives it no lawful Authority; for this Preamble declares, those only are Laws binding to the People, that have been *Originally* establish'd as Laws. The Word (*Originally*) refers no doubt to our very Primitive Institution, which is Common Law, or at least to a time so ancient, as that the Original cannot be traced out, nor shewn, and then it shall be presum'd to be the Common Law. Now I have (I hope) clearly evinc'd that the very first invention and practice of Dispensations by the Bishop of *Rome*, is not time out of mind, nor can the Usage of it here by imitation of the Pope, reach up to a Prescription, in the judgment of our Law, nor by the Rules of it: For Sir *Edward Cook* in his first Instit. *Fol.* 115. treating of a Prescription, and the nature of it, says, That if there be any sufficient proof of Record or Writing to the contrary, albeit it exceed the Memory of any Man living, yet it is within the Memory of Man, in a legal sense, it had its Original since the beginning of the Reign of our King *Richard* the First, (that is in the time of King *John*, and King *Henry* the Third).

No Prescription.

The time of Limitation in a Writ of Right, is limited to the time of R. I.

But that which makes it much the stronger is, that this Declaration of the King and Parliament against such Dispensations and Laws introduc'd without the King and Peoples Consent, does conclude with Negative Words, *viz.* (and not otherwise) and is exclusive of all other, that is, that nothing is Law without their Consent.

And this Statute of Dispensations proceeds further to shew, where the true and lawful Power of Granting Dispensations is vested, in these words, *viz.*

It stands with natural Equity, and good Reason, that in all Laws humane within this Realm, the King and both Houses representing the whole State of the Realm, have full Power to Dispense, and to Authorize some Person to Dispense with those, and all other humane Laws of this Realm, and the same Laws to abrogate, annul, amplify, and diminish as it shall be seen unto the King, the Nobles, and the Commons of the Realm present in Parliament, meet and convenient for the Wealth of the Realm, and then it does dispose of the Power of Dispensation in Matters Ecclesiastical to the Archbishop of *Canterbury*; some whereof are to be confirm'd by the King, and others that may be good without the King's confirming.

Where the true Power of Dispensing resides.

And altho' the body or enacting part of this Statute, extend only to Causes Ecclesiastical, yet the Preamble does reach expressly to all humane Laws.

This Statute of 25th of *Henry* the Eighth, was made in the time of such a King, as we all know, by reading our Histories, stood highly upon his Prerogative, and would never have consented to such a Declaration, concerning the Power of Dispensing, if it had been a special Prerogative in the Crown; and had there been such a Power in the Crown, the King would never have suffered himself to have been depriv'd of it, and to have it dispos'd of into other hands, by the Parliament, and there would have been no need of passing such a Law, the King himself alone could easily have transacted all this Matter provided for by this Act of Parliament, had he had the sole Power.

It is true that the Lord *Hobart*, in his Reports, *Fol.* 146. mentioning this Act of Dispensations, and taking Notice that by the express

words of the Act, all Dispensations, &c. shall be granted in Manner and Form as is prescribed by that Act, and not otherwise; yet he holds that the King is not thereby restrained, but that his Power remains full and perfect as before, and that he may still grant Dispensations as King: for (says he) all Acts of Justice and Grace flow from him.

This and such like Statutes (says the Lord *Hobart*) were made to put things into ordinary form, and to ease the King of Labour, not to deprive him of Power.

This Opinion of his is grounded upon a presumption, that the Power of Dispensing with Laws, was always from the beginning a Prerogative inherent in the Crown, not examining who was the first Author, and the time when it first began, and whence we borrowed the use, and how there was a time within evident proof of credible and authentick Writers, when Dispensations were not in use, and so they are within the time of Memory in a Legal Construction, and cannot be by Prescription.

And it is plain every Legal Prerogative must be so by Prescription, that is, used time out of Memory of Man, and whereof there is no sufficient Writing to the contrary.

But I may appeal to any unbiass'd and equal Judgment, upon the reading of this Act (especially the Preamble of it) whether this Act meerly intended to put things into an ordinary Form, and to ease the King of Labour, or whether it was not to put an absolute stop to the former Practice, and does not directly declare and determine where the true Power of Dispensing ever was, and therein uses those exclusive words (and not otherwise) for those words are in the Preamble, as well as in the Body of the Act.

So that this Construction of the Lord *Hobart's*, That still the King may Dispense alone by himself, and that he might have done so by his Prerogative, before the making of this Statute, and may do so still, notwithstanding this ~~Statute~~ is directly against the very words of the Statute, that says it shall not be otherwise then as the Statute directs, and being in the Negative are the stronger.

And the three Instances, or Cases cited by the Lord *Hobart* all out of *Dyer*, do not come home to the Case of the King's Granting Dispensations in other manner than the Statute of 25 *H. 8. c. 21.* hath directed, which expressly enacts that they shall not be granted otherwise.

1. His first Instance is out of *Dyer*, 211, the Statute of 28 *H. 8. c. 15.* Appoints, that the Commissioners for Tryal of Piracy, shall be named by the Lord Chancellor; now it happened there was no Lord Chancellor, but a Lord Keeper, and it was held that he might name the Commissioners, by the meaning of this Statute, as well as the Lord Chancellor. This is, under favour, but a weak proof of the King's Power or Prerogative, of varying from the Directions of an Act of Parliament, or dispensing with the Rules prescribed by it; for it is a meer imaginary variation, the Lord Keeper ever having the same Power as the Lord Chancellor; and it is not meerly so enacted, but declar'd by the Act of 5 *Eliz. c. 18.* which proves it was Law before. And yet some Judges held the Commissioners were not well named, but that the Commission was void.

2. The second Instance or Authority that the Lord *Hobart* uses to prove his Assertion, that the words (and not otherwise) in the Statute of Dispensations, doe not restrain the King's Power, but that he may
do

do otherwise, is out of *Dyer*, 225. That Queen *Elizabeth* might make Sheriffs without the Judges, notwithstanding the Stat. of 9 *E.2.* this I shall have occasion to examine and speak to more fully hereafter, and therefore shall reserve it till then, and doubt not to shew, it is a mistake: and it was done by the Queen in a case of necessity, it being in the time of the Plague, when the great Officers could not safely meet in the *Exchequer*, (as the Statutes require for the chusing of Sheriffs) and the Term was held at *Hertford*; and the Report says, no Sheriff was named by the Queen, for the most part, but out of those Names that remained in the Bill for the former Year. And the Book only says, *it was held*, the Queen might do it by her Prerogative.

3. The last Instance that the Lord *Hobart* gives is out of *Dyer*, 303. *b.* that the King may grant the Aulnagers Office without a Bill sealed by the Treasurer, tho' the Statute of 31 *H.6. c. 5.* says the Grant of that Office shall be void, without a Bill seal'd by the Treasurer.

The Resolution of that Point is very obscurely reported, but however take it at the strongest, this is in a matter that concern'd the King's Revenue, and where it may more reasonably be said by the King. *May I not do what I will with my own?* And this Statute may easily be understood to be to put the granting of this Office into an ordinary form, and to ease the King of Labour, and not to restrain his Power. If that may be said in any Case, against the express words of a Statute, it may be in a Case that concerns merely his Revenue, as this of the Aulneage was.

In the next place I shall shew, that the stream of Dispensations did anciently run in this channel, till afterwards it found out another course, and that Dispensations with Laws, were only in the same hands as had the Legislature, that is, in the King and Parliament, in former times, and this answers that Example that hath been used, that Almighty God dispens'd with his own Law of the sixth Commandment, when he commanded *Abraham* to sacrifice *Isaac*: God was the great and only Legislator. Now the King is not the sole Legislator.

I shall present you with a very full Precedent and Proof of the Power of Dispensing with Acts of Parliament to be no where else but where the very Legislative Power is. And that the Kings have sometimes accepted it from them in some particular cases, and for some limited time, and with divers restrictions, which is a full acknowledgment that it belongs only to the Legislative Power to dispence with Laws.

The Commons, for the great Affiance which they repose in the King, 15 *R.2. nu. 8.* granted, that he, by advice of his Lords, might make such *Toleration* touching the Statute of Provisions, as to him shall seem good, *until the next Parliament*, so as the Statute be repealed in no part thereof. So also as the Commons may disagree thereunto at the next Parliament, with this Protestation too, that this their Assent being indeed a *Novelty*, (these are the very words) be taken for no example. This is granted with abundance of caution and jealousy, and proves it is not ancient.

The Commons do agree to the Power granted to the King, for the 2 *H.4. nu. 26.* Moderation of the Statutes touching Provisors in the last Parliament, beseeching the King, that the same may not license any Cardinal or Stranger to enjoy any Benefice within the Realm.

R.2.nu.22

It was enacted by the Lords and Commons, that *Tydeinan*, late Abbot of *Beaulen*, and Elect of *Landaf*, by the Pope's provision, should enjoy the same Bishoprick, notwithstanding any Act, so always as this be taken for no example.

17 R. 2. 34

That the sale of Tin may be at *Lofwithiel* in *Cornwal*, and shall not continue at *Calais*. Notwithstanding the Council may grant License to Merchants, to carry the same Tin to what parts they will, as to them shall seem good. Here the Power of Dispensing is delegated to the Council.

2 H.4.nu.63.

Upon the request of the Commons, the King promiseth, that he will not from thenceforth dispence with the Statute of Provisions to Benefices.

This implies, that the King had practis'd it, and we know who began the practice, and who taught it to others, and this Record shews it was without consent, and was a cause of complaint, and the King promises to reform it for the future. But what signifies a Promise, where a Law and an Oath is too weak to secure it? this Promise doth not confer a new Right, but is to reform an unjust Practice.

I shall use one Argument more against this exercise of the Power of Dispensing with Acts of Parliament, as it hath of late been practis'd, and that Argument shall be rais'd from the great Inconvenience and Mischief that will ensue upon it to the Kingdom; it may occasion the infrequency of Parliaments, by taking much of their power out of their hands.

Laws are many times made but probationers and temporary, to the end, that if upon experience of them they be found to be too severe or strict and to sit hard upon any persons, that the Parliament at their next meeting may moderate or relax the severity or inconvenience that may arise by them. But if there be another way allowed for the doing of this Work, there will be the less need of a Parliament, and so other Work, that requires also their meeting, may remain unremedied.

If we consider how frequently the Parliameut ought to meet, and how often they did anciently meet, we shall easily be convinc'd, that the relaxing of a Law, or giving remedy, (where the Law was upon experience found inconvenient) was a work properly belonging unto them, and there was no need of resorting to any other help: for who should cure or reform a Law, if any thing were amiss in it, but the Law-makers? See the Statute of 6 H. 8. c. 18. the Book of Statutes at large concerning *Bristol*.

Our Saxon King *Alfred* and his Wife Men (that is, the great Council of the Kingdom) ordained, that a Parliament twice a Year, and oftner in time of Peace, should meet in *London*. Thus says that ancient Book, stiled, *The Mirrour of Justices*, c. 1. sect. 3. pag. 10. by 4 E. 3. c. 14. It is accorded that a Parliament shall be holden every Year once or more often if need be; this does not abrogate nor alter King *Alfred's* Law.

By 36 E. 3. c. 10. many Laws had passed in that Parliament of 36 E. 3. which are there called Articles, (as anciently our Statutes were drawn into certain Articles, and so passed, as being Articles of Agreement betwixt the King and his Subjects (as I had occasion to observe in the beginning of my Discourse) and this Statute of 36 E. 3. provides, that for maintenance of the said Articles and Statutes and redress

of

of divers Mischiefs and Grievances, which daily happen, a Parliament shall be holden every Year, as another time was ordained by a Statute) referring to the Statute of the Fourth of this King.

The Act of 16 Car. 2. c. 1. for repeal of the Triennial Act made 16 Car. 1. in the last Paragraph recites, that by the ancient Laws and Statutes of this Realm, made in the Reign of King *Edward* the Third, Parliaments are to be held very often; and this Act of 16 Car. 2. makes a new provision, to the end (as the words are) there may be a frequent calling, assembling and holding of Parliaments once in three Years at the least.

Now let us enquire what the proper Work of a Parliament is, which the said Statute of 36 E. 3. mentions in part, viz. for maintenance of the Articles and Statutes and redress of Mischiefs and Grievances that daily happen (as that Statute recites).

Sir *Tho. Smith*, (who was principal Secretary of State) in his *Treatise de Republica & Administratione Anglorum*, L. 2. c. 2. fol. 50, 51. says this of the Parliament.

In Comitibus Parliamentariis posita est omnis augustæ Absolutæq; potestatis vis veteres leges jubent esse irritas, novas inducunt, præsentibus modum constituunt. (There is the true dispensing power) *Incerti juris controversias Dirimunt.*

Bracton writes of this High Court, *Habet Rex Curiam suam in concilio suo in Parliamentis suis ubi terminatæ sunt dubitationes Judiciorum & novis injuriis emerfis, nova constituuntur remedia.*

The *Mirroure of Justices*, c. 1. pag. 9. says, that Parliaments were instituted to hear and determine the Complaints of the wrongful Acts of those against whom the Subject otherwise could not have common Justice, that is, against great and powerful Delinquents.

Nihil prodest (says *Bracton*) *Jura concedere nisi sit qui Jura tueatur.*

So that there is need of a frequent resort to be had to the Law-makers, not only to resolve difficulties of Judgments, but to keep the power of Interpretation within its due bounds, and the Law hath taken care for frequency of Parliaments.

Sir *Francis Bacon*, in his Advancement of Learning, gives this excellent Advice to Law-makers, and to those to whom it belongs to defend the Laws.

Let not (says he) *Prætorian Courts* (speaking of Courts of Equity) have power to decree against express Statutes, under pretence of Equity; for (says he) if this should be permitted, a Law interpreter (that is a Judge) would become a Law-maker, and all Matters should depend upon Arbitrament, (that is) upon an Arbitrary Power. And Arbitrament would encroach upon, and at last swallow up Law.

The power of extending or supplying or moderating Laws, little differs (says he) from the power of making them.

Courts of Equity sometimes, under the pretence of mitigating the Rigor of the Laws, (and such is the Power of Dispensing) relax the Strength and Sinews of Laws, by drawing all to Arbitraments: he was well able to judge of this, having been Lord Chancellor. And it is his 46th *Aphorism*. That is the best Law which gives the least liberty to the Judge; he is the best Judge, that takes least liberty to himself.

Therefore where any new Law fits uneasie and too hard and heavy in some particular cases, it were much safer to suffer the mischief for a time, (if any such happen) and let it wait till those that gave the wound come to cure it. *Una eademq; manus vulnus opemq; feret.* The overhasty cure, arising from the impatience of enduring pain, makes the case the worse: frequency of Parliaments is a proper cure. Other ways of cure are apt to cause infrequency of Parliaments.

* *Hob.* 157.
at the lower
end. It is the
Office of Jud-
gesto advance
Laws made
for Religion,
according to
their end, tho'
the words be
short and im-
perfect.
† *Sir Ro. Cott.*
Abridg. 1 R. 2.
nu. 95. 2 Inst.
408.

And in Matters of great difficulty which come before the Judges in the Courts of *Westminster*, or if there be no great difficulty, yet if it be of mighty concernment and not clearly concurring with the * intent and words of Law-makers, but the Law in the scope of it, is like to be frustrated by an hasty determination, it is, under favour, the Duty of the Judges in such Cases of † *Dubitaciones Judicior* to rest till the Parliament meet, and then to propose it to the Parliament for their resolution. Thus it is expressly provided in the Statute of Treasons, 25 E. 3. to defer doubtful Cases till the Parliament resolve them, being in a matter of so high concernment as that of Treason.

And in Cases of much lesser consequences, especially upon a new Law, (as that is that we have before us) in several Cases cited in *Blackamore's Case*, the Judges have sought to the Parliament for a Resolution in smaller matters.

8 *Rep.* 158. In doubts arising before the Judges in their Courts, upon the Construction of Acts of Parliament, the Judges resorted to the Council, (which is there said to be meant of the great Council, (the Parliament) that made the Act in the Case there cited.

* 39 E. 3. 21.
40 E. 3. 34.

The Question * did arise upon the Statute of 14 E. 3. c. 6. which gives power to Courts to amend Misprisions of Clerks in Process, in writing a Letter or Syllable too much or too little: But whether these words in the Act, gave power to amend where there was a whole Word too much or too little, was the Question, and the Lords declared, 39 E. 3. 21. that their meaning was, that in such Cases the Process should be amended: this shews the tenderness of the Judges in those times, in construction of new Acts of Parliament, and the frequency of Parliaments and the resort still had to them in case of Doubts. And this was in the time of E. 3. the most flourishing time of the Law; and a Case that the then Archbishop said had *no great difficulty in it.*

Objection.

But I presume it will be said against me, that this is a clear Case in Law which is now before us, and that there was no doubt nor difficulty in it, but that the King by his Prerogative could dispence with this Act of 25 Car. 2. and that all the twelve Judges (but one or two) was of that opinion, and that the Point hath formerly been resolv'd in the Case of Continuing a Sheriff in his Office longer than one Year, notwithstanding the several Acts of Parliament to the contrary, and that was so resolv'd by all the Justices in the Exchequer Chamber, 2 H. 7. and by the opinion of Sir *Edward Coke*, 12 *Rep.* 18. and repeated in *Calvin's Case*, 7 *Rep.* 14. which are the only Authorities that come home to the Case, and none of them ancient.

Before I speak to these Authorities in the Case of Dispensing with a Sheriff to continue longer than a Year, I shall make it appear, that the Case now in question, or the Point in Law of this Case, was very much doubted, if not clearly held on the contrary, that the King could not dispence with this Act of 25 Car. 2. and that by no mean Judgments.

If

If the King could have dispens'd with it by his Prerogative, and it had been so clear, what need was there of his Majesty's proposing it to the two Houses, at the opening of a Session, to allow him a Power of Dispensing with this Law? or that they themselves would dispence with it? why would the two Houses, after long debate about it, excuse themselves from consenting to that which the King could do without them? were there no Judges that did scruple the doing of it?

If it were a Prerogative in the King, how came it to be so long before the King's learned Council could start it? we heard nothing of this till all other ways were tryed.

Let me add to this what was spoken by the late King's own command and direction in the House of Lords, before the King and both Houses, and all the Judges present, by a late Lord Chancellor, who as he was an excellent Orator, so he was a very learned Lawyer, and my honourable Friend.

It was in his Speech made to both Houses the Twenty third of May, 1678. (about five Years after the making of this Act of 25 Car. 2.) and it was spoken in reference to this very Act of Parliament.

Hath not the late Act (says he) made it impossible, absolutely impossible for the most concealed Papiſt that is, to get into any kind of Employment? And did ever any Law since the Reformation give us so great a security as this?

Hereupon, in the same Speech, that noble Lord does declare it now a stale Project to undermine the Government, by accusing it of endeavouring to introduce Popery, that a man would wonder to see it taken up again.

This Law had so abundantly secured us against the Danger of it.

And yet, after all this, do we hear the Judges openly and judicially declaring, that it appear'd to them to be a very plain case, that the King alone could dispence with this Act of Parliament by his Prerogative: and tho' it was acknowledged to be a Case of great consequence, (as the truth is) yet it was pronounc'd withal to be of as little difficulty as ever any Case was, that rais'd so great an expectation.

These are strong Arguments to prove the Doubtfulness of it: after all these Refusals or Hesitations, it might very well be accounted a Doubt or Difficulty, worthy to be referr'd to the judgment of the Parliament, if the Parliament had not already in effect given their judgment to the contrary.

As I remember, it was in February 1663. that the two Houses made an Address to the last King, for revoking a Declaration, whereby his late Majesty had granted a Toleration and Indulgence to some Protestant Dissenters, as *being against Law*, and such a Toleration was declared illegal by the Parliament in 1672. These are two Resolutions in the point by the Supream Judicature.

If this Prerogative of Dispensing with Acts of Parliament were in the Crown by Prescription, (as it ought to be if it were a legal * Prerogative) it ought then to be confin'd and limited to such cases only where-
* 12 H.7.19. Plowden 319, & 322.
 in it had been anciently and frequently exercis'd: and there ought to be no extension of Cases where they are depending upon a Prescription, nor is there any arguing a *Paritate rationis* in such Cases and which have their force meerly from ancient and constant Usage. It

It is a Rule at Common Law, *Ubi eadem est ratio ibi idem Jus* : But this Rule doth not hold in Customs and Prescriptions.

In the Case of *Bayly and Stevens*, in *Croke, Jac.* 1. fol. 198, it was held *per Curiam*, that where Lands in Borough English descend to the youngest Son, and he dies without Issue, that the Land in such Case shall not go to the younger Brother without a particular Custom ; but the elder Brother shall have it, for the usage had been in the one, but not in the other Case ; yet these two Cases are very near of kin.

Now this Prerogative of dispensing with Acts of Parliament, in the original use and exercise of it, was but in very few Cases, and those which more directly concern'd the King himself immediately, in his Revenue, or the like, which were Cases of no great Consequence, and such wherein the Law-Makers, in making their Laws, might be easily understood not to intend to abridge the King of his Power, but to ease him rather of Labour, and to put things into an ordinary course, which yet the King might depart from, if he were so minded, and if he did accordingly signify his Pleasure, by granting an express (*Non Obstante*) the Act of Parliament to the contrary) and making particular mention of the Act : *Unusquisque renunciare potest Juri pro se introducto*.

Or in Cases where there is no disability impos'd upon a Person by the Act, but only a pecuniary Penalty given to the King, and forfeited by the Subject, transgressing the Act, where the King is *Creditor pæne* ; it seems more reasonable that the King may dispense with the Penalty that will be due to himself. And these, and such like, are the only Instances given in that great Case of 2 *H. 7.*

* Sir Francis
Moor's Re-
ports, 239.
Warran's
Case: A Pre-
rogative that
tends to the
great preju-
dice of the
Subject, is
not allowa-
ble.

But to dispense with an Act of Parliament, made in a Case of the highest * concernment to the Publick that can be, wherein Religion, and the Government are so deeply concern'd, and where the King himself, and the Parliament, have thought fit to disable any Person to do to the contrary, and so pronounc'd it, and have put an incapacity upon Persons, and adjudged the thing done to the contrary void ; this hath been of latter times, and but of late found out and practis'd, and is not warranted by any Prescription.

I shall cite some Resolutions to this purpose, that the King cannot dispense with Disabilities and Incapacities imposed upon any Person by Act of Parliament.

Croke, Jac.
385. The
same Case.

The Lord *Hobart's* Reports, fol. 75. in the Case of the King against the Bishop of *Norwich*, Ref. That if an Incumbent were guilty of Symony in obtaining a Benefice, he was made incapable of that Benefice for ever, by the words of the Statute of 31 *Eliz. c. 6. Paragr. 5.* And the Case of Sir *Arthur Ingram* was cited, who bought the Office of Cofferer ; he was holden by *Egerton* Lord Chancellor, and *Coke* Chief Justice, incapable of that Office, by force of the Statute of 5 *E. 6. c. 16.* tho' he had a *Non Obstante* ; and the reason there given is in these words:

For the Person being disabled by the Statute, could not be enabled by the King : And yet the Office of Cofferer is a special Service about the King's Person, and his Treasure.

The Lord Chief Justice *Vaughan*, in his Reports of the Case of *Thomas and Sorrel*, fol. 354, 355. gives this for the reason why the King cannot dispense with a Man to buy an Office contrary to the Statute of *E. 6.* nor with one Simoniacally presented, to hold that Living, or to be

be at any time after presented to it ; nor with any of the House of Commons not to take the Oath of Allegiance, according to the Statute of 7 Jac. 1. c. 6. Because (says he) the Persons were made incapable to hold such Office or Living, and a Person incapable is a dead Person, and no Person at all, to that wherein he is incapable.

And a Member of the House of Commons is by 7 Jac. *Persona inhabilis*.

1. Inst. fol. 120. In the Case of the *Simonist*, Sir E. C. says, The Act so binds the King, as that he cannot present him that the Law hath disabled, for ever after, to be presented to that Church. The words of the Act be: *He shall be from thenceforth adjudged a disabled Person in Law, to have or enjoy the same Benefice.* And the Party being disabled by the Act (says Sir E. C.) cannot be dispens'd withal by any Grant by a *Non Obstante*, as it may be where any thing is prohibited *sub modo*, as upon a Penalty given to the King.

The Case of Sir John Bennet does not at all contradict these Authorities. It is *Croke, Car. 55.* Sir John Bennet by Sentence in the Star-Chamber, was made incapable of any Office of Judicature for Bribery, *Ref.* by all the Judges, and Barons, that by the King's Pardon, all Inabilities are discharg'd, because the Sentence could not take the Office from him being Freehold, over which the Court had no Power.

So that after so often declaring by several Acts of Parliament, Grants, and Patents made contrary to their Acts to be void, and all Dispensations, and *Non Obstante's*, to the contrary of the Laws made by them, to be void, and inflicting Penalties upon such as should obtain those Grants, and *Non Obstante's*, or make use of them as appears by a multitude of Acts ; and all these too weak, and all in vain by the Judges allowance of these *Non Obstante's*, the Parliament had no other fence against these *Non Obstante's*, but to fix a disability in the Persons, and to make them incapable of taking the benefit of such Grants ; and this hath held good till now, but now they break through this too.

And as I observ'd in the Pope's Exercise of his Power of Dispensing, that it was used with some moderation at first, in Cases that seem'd to be of great necessity only, but at last, by degrees, it grew to be intolerable and unlimited : So the like may be observ'd in the use of this Prerogative.

3. Instit. fol. 236, in the Chapter of Pardons, by divers Acts of Parliament, the King's Power of Granting Charters of Pardon hath been restrained, as by 2 E. 3. c. 2. 10 E. 3. c. 2. 14 E. 3. c. 14. 13 R. 2 Stat. 2. c. 1. these are ancient Statutes. It hath been conceiv'd (says Sir E. C.) which we will not question (says he) that the King may dispense with these Laws by a *Non Obstante*. Yet Sir E. C. there declares, That he found not any such Clauses of *Non Obstante*, to dispense with any of these Statutes, but of late times. This shews that it is a growing mischief and had not been anciently used, as it ought to have been to make it a good Prescription and Prerogative.

I shall now examine the Authorities and Cases that are cited in defence of this Prerogative and Power of dispensing with a disability impos'd by Act of Parliament ; for I do not purposely dispute it in any other Case, but as they are coincident with this.

The first that we meet with, is that of 2 H. 7. fol. 6. and it was by all the Justices in the Exchequer-Chamber. The Case thus :

I

King

King *Edward* the Fourth granted the Office of Sheriff of a County to the Earl of *Northumberland*, for the Life of the Earl, and the Justices held the Patent good, there being a *Non Obstante* in it to the Statutes.

* 14 E. 3. c. 7. Let us look into * the Statutes that forbid a Sheriff to continue in his Office longer then one Year : There had been several † ancient Statutes made to that purpose, but they all prov'd to be of little effect, for Patents were still granted to hold the Office of a Sheriff, for a longer time than one Year.

At length came the Stat. 23. H. 6. c. 8. which recites the former Statutes forbidding any Persons continuance in the Office of Sheriff, above one Year ; and observing the great Oppressions and Abuses to the People, that did arise from it, and how that yet they were granted contrary to those Statutes. This Statute therefore of 23 Hen. 6. ordains that those Statutes shall be duly observ'd. And further ordains, That if any occupy that Office contrary to those Statutes, or to the effect or intent of any of them, he shall forfeit two hundred Pound yearly, as long as he occupieth contrary to any of those Statutes, and that every Pardon granted of that Forfeiture shall be void, and that all Patents made of the Office of Sheriff, for Years, or any longer time, shall be void, any Clause, or word of *Non Obstante* in any wise put, or to be put in such Patents notwithstanding ; and every such Person is thereby disabled to bear that Office.

Nothing could be penn'd stronger than this Statute, and it is a Law made by the Supream Legislative Power of the Nation, and it expresses the former granting of *Non Obstante's* to be a great abuse, and to be contrary to Law. Yet contrary to the express words, and clear intent and meaning of this Statute, did all the Judges resolve in 2 H. 7. That by a *Non Obstante*, a Patent for a longer time than a Year should be good, of the Sheriffs Office.

The King, and both Houses were of Opinion, that they could make a *Non Obstante* in such Case void. The Judges are of a contrary Opinion, that a *Non Obstante* shall make void the Statute. Here is an Inferiour Court over-ruling and controuling the Judgment of a Superiour Court. The Judges who are but *Jura dicere*, contradict those who have the Power *Jura dare*, as well as *Jura dicere*, and of Correcting the Errors of the highest Court in *Westminster*, and controuling their Judgments.

The Statute was a meer idle nugatory thing, if it were not to restrain the granting of a *Non Obstante* : if it did not that, it did nothing. The King himself alone, (if he had pleas'd) could without any Act of Parliament, have reform'd the Abuse, by refusing to pass any such Patents for a Sheriffs continuing in his Office longer than a Year. But the King was sensible of the Abuses, and therefore willing to be restrained from passing any more such Patents, and to avoid any importunity that might be used for the obtaining any such Patents, and therefore consented that a Law should pass to make such Patents void. And after all, shall the King (if he pleas'es) still make the like Grants ? Why then the Act was of no manner of use, and operates nothing ; and the Resolve of the Judges has made the Act a meer idle vain thing.

But

That by their trusting to tarry in their Office by procurement they are encouraged to do many Oppressions to the People.
28 E. 3. c. 7.
42 E. 3. c. 9.
1 R. 2. c. 11.
† Sir Robert Cotton's Abr.
18 E. 3. nu. 54.

But the twelve Judges in 2 H. 7. have so resolv'd, and the only use *Objection.* they would allow to all these Acts of Parliament is no more than this, that if the King grant a Patent to one of the Sheriffs Office for more than one Year, and there be no *Non obstante* in the Patent, that then, for want of a *Non obstante*, the Patent should be void by those Acts of Parliament which otherwise would have been good, had not those Acts made them void.

But how easie would it be for one that obtains such a Patent, to get *Answer.* the *Non obstante* to be inserted? and who would accept such a Patent without a *Non obstante*? and to whom would the *Non obstante* be denied to whom such a Patent is granted? the Lord *Hobart*, in the Case of *Needler* against the Bishop of *Winchester*, fol. 230. says it is denied to none, and that it is in the power of the Attorney-General.

The Reasons given by the Judges in 2 H. 7. for that resolution, are, because the King had always used such a Prerogative of dispensing with the Acts of Parliament that required the * true value of the * 1 H. 4. c. 5. Lands, and the certainty of the Lands to be mentioned in his Grants of Lands, and with the Acts concerning the † shipping of Wool, † 11 E. 3. c. 1. 13 H. 7. 8. by *Daver's* Letter B. and pardoning of Murder (without expreis mentioning of the Murder.)

These Cases are nothing alike, but of a trifling consideration in re- *Answer.* spect of the Act we have in hand of 25 Car. 2. And in these Cases the Penalty and * Forfeitures are given to the King, and they concern the * See 13 H. 7. 8. by *Daver's* Letter B. King's profit only to dispence with them: but in our Case the Safety of the Government, & *salus populi*, and the maintaining of the true Religion establish'd by Law, are all concern'd, and so the Case is not alike. And to compare this with those Cases, is *parvis componere magna.*

This Opinion and Resolution of the Judges in 2 H. 7. has been the Foundation of all the like Opinions that have since that time been given of the King's Power of Dispensing with Disabilities and Incapacities impos'd by Acts of Parliament. Upon what ground the Justices held the Patent of the Sheriff's Office, good to the Earl of *Northumberland* for Life, does not appear, whether because it had formerly been an Office of Inheritance, and so within the Exception in the Statute of 23 H. 6. or whether by virtue of a *Non obstante* to the Statutes, as *Ratclif* only argues, for the rest say nothing of the *Non obstante*. Some Resolutions have been to the contrary of that of 2 H. 7. as in the Case that I cited of the King against the Bishop of *Norwich*, in the Lord *Hobart's* Reports, and the Case of Sir *Arthur Ingram*, where it was adjudged, that the King could not dispence with a Disability.

And the Book of 2 R. 3. fol. 11 & 12. concerning *Waterford* in *Ireland*, is of the King's Power to dispence with an Act of Parliament where the Forfeiture is given only to the King: so it comes not home to our Case.

This Resolution of the Judges in 2 H. 7. was the Precedent and leading Case to all the subsequent Opinions, and was the Foundation of them, and they all must stand and fall by it.

Now it will be very evident, that the King had no such Power or Prerogative of continuing Sheriffs in their Offices longer than a Year. For, under favour, the Making of Sheriffs, doth not, nor never did, belong to the King, neither at the Common Law, nor by any Act of Parliament;

liament ; so that all these Opinions and Resolutions are built upon a sandy Foundation, and have but *debile fundamentum*, and they take that for granted, which is not a truth.

Election of
Sheriffs by
the County.

The Election of Sheriffs, at the Common Law, even from the very first Constitution of the Kingdom, and by the Original Institution of the Government, was in the Freeholders in the several Counties, ever since there was any such Office as a Sheriff, and ever since the Kingdom hath been divided into Shires, that is, in the time of the Saxons, (from whom we derive most of our Common Law) and long after their time, in the time of the Normans, till being neglected by the Freeholders, it came at length, by an Act of Parliament, made within the legal time of Memory, to be taken from the Freeholders, and the Power of Naming and Chusing Sheriffs every Year lodged in the hands of certain great Officers of State, and so it continues to this day ; but neither is, nor never was in the King.

Mr. Lambard, in his Book *de Priscis Anglorum Legibus in his Lemma de Heretochiis*, fol. 147. says, that those *Heretochii* were *Ductores exercitus*. (Here, signifying an Army in the Saxon Tongue. The same as in the Dialect of this present Age may be called Lord-Lieutenants or Deputy-Lieutenants. The Law of King Edward (which I take to be the Confessor) speaks of these *Heretochii*, in these words : *Isti vero viri Eligebantur per Commune Concilium pro Communi utilitate regni per provincias & Patrias Universas & per singulos Comitatus in pleno Folkmote sicut & Vice-Comites Provinciarum & Comitatum Eligi debent*. This Law mentions this Election, as an Use and Custom.

If the King did not make the Sheriff, he could not continue him Sheriff ; if he could not make him for a Year, he could not grant him the Office for longer than a Year : the Sheriff had his Authority and Office from the Election, not by Commission or Patent, and that but for a Year.

Fol. 174, 175. Sir Edward Coke, in his Second Institutes, in his Exposition of the Statute of Westminster 1. Cap. 10. concerning the Election of the Coroners by the Freeholders, (which ever was so, and so still continues) says, there is the same reason for Election of Sheriffs, and so (says he) it anciently was by Writ directed to the Coroners.

In like manner were the Conservators of the Peace chosen, in whose place the Justices of the Peace now succeed, and so the Verderors of the Forrest are to this day.

These were great and high Liberties, and did belong to the Freeholders from all antiquity, and are strong Arguments to confute those late Authors, that will by no means allow of a limited Government, but leave us under an Absolute and Arbitrary Power, and who call our Laws and Liberties, but the Concessions and Condescensions from the Regal and Absolute Power.

28 E. 1. c. 8.
& chap. 13.
See the Reports of E. 2.
and Memoranda Scac'
fo. 28.

Sir Edward Coke discourses largely of these Elections, in his Exposition of the Statute of *Articuli super Chartas*, in his Second Institutes, or *Magna Charta*, fol. 558. By this Statute (it is said) the King hath granted to his People, that they have the Election of their Sheriff in every County where the Sheriff is not of Fee, if they will.

Sir

Sir *Edward Coke* says, by this Act, that ancient Right the People (that is, the Freeholders) had, was restor'd to them; and the words (if they will) import, that they formerly had it, but neglected it.

By a Statute made in the next King's Reign, viz. 9 E. 2. styled, *The Statute of Sheriffs*, upon pretence, that insufficient persons were commonly chosen for Sheriffs: by that Act it is ordained, that from thenceforth the Sheriffs shall be assigned by the * Chancellor, Treasurer, Barons of the Exchequer, and by the Justices.

* Sir Rob. Cor.
Abr. 18 E. 3.
nu. 54.

And by the Statute of 14 E. 3. c. 7. some change is made of the persons that are to have the Election, and the Day and Place of such Assigning of Sheriffs is prefix'd, viz. yearly in the morrow of *All-Souls*, and in the Exchequer.

By the Statute of 12 R. 2. c. 2. the Assigning of the Sheriff is put into the hands of more great Officers, who are to be sworn to execute this Trust faithfully, but it is not vested in the King all this while, nor never was.

It is true, that out of Reverence to the King, these great Officers, who had the Assigning of Sheriffs, did afterwards use to name three persons, out of which number they left it to the King to chuse one for every Shire. But this was more out of deference to the King, than out of any strict Obligation so to do, and the Election made by the King, was in Law to be accounted an Assignment by these great Officers.

Nor could the King chuse any other for Sheriff than one of those three so Assigned by those great Officers, tho' it is sometimes otherwise practis'd. And this hath been a Resolution of all the Judges of *England*, and is mentioned in Sir *Edward Coke's* Second Institutes, fol. 559. it was in the 34th Year of *Henry the Sixth*, and it is in these words, viz.

That the King did an Error, when he made another person Sheriff of Lincolnshire then was chosen and presented to him by those great Officers, after the effect of the Statute. So that the right of Electing Sheriffs by those great Officers, we see, continued so lately as the latter end of King *Henry the Sixth*, and I know of no Law since, that hath alter'd it: therefore we may conclude, it is no Prerogative in the King.

And we may further observe, what plain Language all the Judges used in those days, as to tell the King and the Lords of the Council, that the King had *erred* in what he had done. I observe this the rather, that it may be some excuse to me for the plain Language I am forced to use in the Arguing upon this Subject. The Lawyers are not always Courtiers, nor will the Subject-matter bear Complements and Courtship. *Ornari res ipsa negat, contenta doceri.*

I cannot reconcile this Resolution of the twelve Judges, given in the time of King *Henry the Sixth*, with that Opinion that is deliver'd in the Lord *Dyer's* Reports, fol. 225. b. and it is but an Opinion. 5 & 6 of *Queen Elizabeth*. In the time of the Plague, the Sheriffs were named and made without assembling the Judges *ad Crastinum Animarum* at the Exchequer, according to the common usage, but for the most part none was made but one of the two that remain'd in the Bill the

last Year. Tho' it was held, (says the Report) that the Queen, by her Prerogative, might make a Sheriff, without such Election, by a *Non Obstante aliquo Statuto in contrarium*, which crosses the Resolution I now mentioned. It is but an Opinion against a Solemn Resolution of all the twelve Judges.

See the Stat.
of 6 H. 8. c. 18.
in the Sta-
tures at large
concerning
the Under-
Sheriff of
Bristol.

I find, that some who had transgress'd that Act of 23 H. 6. and had continued above one Year in that Office of Sheriff, soon after the making of that Act, did not think themselves secure against the Penalty of that Act by any *Non obstante* from the King, but procur'd an Act of Parliament to indemnifie them for what they had done; for, by another Act made the 28th of the same King Henry the Sixth, it is ordain'd, that the Sheriffs for the Year then last past, should be quit and discharged against the King and his People, of the Penalties of the 200 l. which they incur'd by the Statute of 23 H. 6. by Exercising the Office of Sheriff longer than a Year, from the day next after the day of all *All-Souls*, on which day, by the Statute, a new Election was to have been made.

I have one great Authority more, and that is of an Act of Parliament too, which, in my judgment, clearly proves, (against this Resolution of the twelve Judges in the time of 2 H. 7.) that the King had no such Prerogative to dispence with the Sheriff's continuing in his Office longer then a Year. But that the only dispensing Power was in the King and Parliament, as I have affirm'd, and in the King, when any Special Act of Parliament shall for a time limited enable him so to dispence. And it is an Act in the time of a wise and powerful King, who would not lose his Prerogative, where he had right to it.

9 H. 5. c. 5.

It is the Statute of 9 H. 5. c. 5. in the Statutes at large, this Statute recites the Statute of 14 E. 3. whereby it was ordain'd, that no Sheriff should continue in his Office above a Year. And it recites further, that whereas at the making of that Statute, there were divers valiant and sufficient persons, (I suppose it is ill translated (valiant) and it should have been (men of value) in every County of *England*, to exercise the said Office well, towards the King and his People: But by reason of divers Pestilences within the Realm, and Wars without the Realm, there was not now such sufficiency of such persons. It is therefore ordained, that the King, by Authority of this Parliament of 9 H. 5. may make the Sheriffs through the Realm, at his will, until the end of four Years, notwithstanding the said Statute made 14 E. 3. or any other Statute or Ordinance made to the contrary.

Here the King is entrusted with the Power, and that but for a short time in the very Case of continuing Sheriffs in their Offices longer than a Year, and that in a case of great and absolute necessity, and this by a Special Act of Parliament, which plainly shews, he could not do it by any Prerogative he had of dispensing, for then he would never have taken it under an Act of Parliament.

What ground therefore the Judges had in the second Year of Henry the Seventh, to adjudge it to be a Prerogative in that King, I cannot see: and that Resolution is the leading Case to all the Opinions that have been delivered in the Point, since that time, and the Opinions still

still justifie themselves by that one first Resolve, and cite that for their great Authority : That Opinion seems to be delivered upon a sudden Question, put to the Judges by the King's Council, not argued nor deliberated on, nor upon any Case that came Judicially before them, and the Judges there take notice only of two ancient Statutes, viz. 28 E. 3. c. 7. 42 E. 3. c. 9. both which barely forbid the Sheriffs to continue longer than a Year in their Office, but no Penalty is imposed ; and the Earl of Northumberland's Case had a *Non Obstante* in it only to these two Statutes, as appears by the Abridgement of that Case by *Brook, Tit. Patent's Case*, 109. So that they did but, *ad pauca respicere & de facili pronunciare*. But they do not take the least notice of the Statute of 23 H. 6. c. 8. which makes the disability, nor do the Judges in that Case, give that reason for their Judgment, as Sir E. C. hath since found out to justifie it, viz. His Prerogative inseparable, &c.

Something may be observed from the time when that strange Resolution pass'd : *Judicis Officium est ut res ita tempora rerum querere*. It was in 2 Henry the Seventh, in the beginning of the Reign of that King, who stood high upon his Title and Power (if we may believe a late Historian.)

(Mr. Buck.) in his History of the Life and Reign of Richard the Third, who in his Second Book, fol. 54. discourses likewise of King Henry the Seventh, and his Title to the Crown, says of him, That he seemed to wave all other Titles, and stuck to that of his Sword and Conquest, and at his Coronation he caused Proclamation to be made with these Titles, *Henricus Rex Angliæ Jure divino, Jure humano, & Jure belli*, &c. Which yet the Barons could not agree to, tho' the King peremptorily avowed he might justly assume it, having as a Conquerour, entred the Land, fought for the Crown, and won it. The Barons answered (says the Historian) as peremptorily, That he was beholding to them both for his Landing and Victory. But the more they opposed it, the more he insisted upon it.

Now that King that made his Title by Conquest, might carve out to himself what Prerogatives he pleased ; And who durst dispute it with him ? And this probably might have some influence upon that Resolution of the Judges, being so early after his Claim, viz. 2 H. 7.

But I find Sir E. Coke, a Chief Justice of great Learning, and of as great Integrity, taking up the same Opinion : It is in the Reports that go by the Name of Sir Edward Coke's, 12 Rep. fol. 18. No Act, says he, can bind the King from any Prerogative which is sole and inseparable to his Person, but that he may dispense with it by a *Non Obstante*, as a Sovereign Power to Command any of his Subjects to serve him for the Publick-weal ; and he instances in that of a Sheriff, and quotes the Resolution of the Judges of 2 H. 7. and urges that of Judges of Assize, that they may go Judges of Assize in the Counties where they were born, or did inhabit, if the King dispense with it by a special *Non Obstante*.

But he gives another instance, which I presume none in these days will subscribe to ; and if he mistook himself in this instance, he may be supposed to mistake and err in all the rest : *Purveyance* (says he) for the King and his Household is incident solely, and inseparably to the Person of the King : And for this Cause the Act of Parliament of Henry the Third, *de tallagio non concedendo*, which bars the King wholly of Purveyance,

veyance, is (says he) void. If this be Law, what a Case are the Subjects in, that have given a Recompence by a Revenue of Inheritance (in part of the Excise) to the King, in lieu of Purveyances.

It is sober Advice given by Learned *Grotius*, in his Book *De Jure Belli & pacis*, 82. Let us not (says he) approve of all things, tho' delivered by Authors of greatest Name, for they often serve the Times, or their Affections, and bend the Rules as occasion requires.

This Resolution of all the Judges, in the Second of *Henry* the Seventh, is again cited in *Calvin's Case*, in Sir *Edward Coke's* Seventh Report, and there a Reason is given to justify that Resolution, which is not so much as touch'd upon in the Report itself, of 2 *H.* 7. but it has been studied and found out since that Resolution, viz. That an Act cannot barr the King of such Service of his Subject, which the Law of Nature did give him.

And this is the main Reason insisted on in the late Judgment given in Sir *Edward Hales's Case* (as I am informed); which is the only Case, that I find, which came to be argued upon the very point, yet it was but lightly spoken to, for that of 2 *H.* 7. which is the first of the kind, was not upon a Case that came Judicially before the Judges, but was upon a Consultation only with the Judges, and without Argument.

Nor in any other Authorities that I have cited, grounded upon that Resolution of 2 *H.* 7. did the Point directly come in question Judicially.

And *Calvin's Case* is the first that I find, which offers this special Reason, viz. That no Act of Parliament can restrain the King from commanding the Service of his Subject, but it is an inseparable Prerogative in the King; and as Sir *E. C.* speaks in his 12 *Rep.* Tho' an Act makes the King's Patent void, and tho' the King be restrained to grant a *Non Obstante*, by the express words of the Act, and tho' the Grantee is disabled by the Act to take the Office, yet the King (says Sir *Edward Coke*) may by his Royal Sovereign Power of Commanding, command a man by his Patent, to serve him and the Weal-Publick, in the Office of Sheriff for Years, or for Life: And this the King may do for such Causes as he in his Wisdom shall think meet and profitable for himself, and the Common-weal, of which he himself is solely Judge, says Sir *E. C.* So tho' the King and Parliament have adjudged and declared by a Law, such a person, or such a sort of persons to be altogether unfit for such a Service or Office. As for Example: They have adjudged Papists (who own a Forreign Authority and Jurisdiction, and who hold Doctrines destructive and contrary to the Religion Established in this Kingdom) to be very unfit and incapable of being entrusted with the maintaining of the Government, and the Religion Established by Law, in this Kingdom. Yet according to late Opinions and Resolutions, tho' the King himself, by the Advice of his Great Council, have so adjudged and declared, yet he may do otherwise, and he may employ a Papist to defend the Protestant Religion; and he is the sole Judge of the fitness of Persons for his Service. This is the Discourse, this is the Argument and Reason used.

Will this Reason be allowed of, shall the King be the sole Judge of the Persons fit to serve him in all Cases, and is it an inseparable Power and Prerogative in the Person of the King?

I shall

I shall put a Case wherein the Judges depart from this Opinion, and appear to be of another mind.

In the Lord *Anderson's* Reports, the 2^d Part, 118. It is there said, If an Office in the King's-Bench or Common-Pleas be void, and the placing of the Officer belongs to the King, if the King grant it to a person not able to execute it, the *Grant is void; as 'tis there held by many * *Palmer's* of the Justices. And there a Case is cited out of 5 E. 4. rot. 66. where Rep. 451. one *Tho. Wynter* was placed by the King in the Office of Clerk of the Crown in the King's-Bench.

The Judges, before the King himself, did declare him to be *Inhabilem ad Officium illud pro commodo Regis & populi sui Exercendum*, and he was laid by, and one *Roger West* (at the commendation of the Judges) was put in.

Will any man presume to say the person is unfit, when the King, who is the sole Judge of the fitness of persons to serve him, hath adjudg'd him fit? yes, the Judges, in a Case that concerns the Courts where they sit, (it seems) will controul the King's own judgment, and judge the person *inhabilis*, and hold the Grant void in such case.

To compare our present Case with this: The King and Parliament by a Law have adjudged the Papists unfit to be entrusted with the Government, and with the preserving of the Reform'd Religion: but (says the Judges) if the King, without the Parliament, judge otherwise, his judgment shall prevail: why not as well in the case of an Office in the Courts at *Westminster*, which does belong to the King to dispose of, as in an Office that immediately concerns the Safety of the King and Kingdom and the great concernment of Religion?

So here is one Command of the Kings set up in opposition to another Command of the King. A Command of the King upon private advice, or (it may be possible) gained from him by surprize, by an importunity or an undue solicitation, against a serious solemn deliberate Command of the King, upon advice with his great Council, and with the Consent of the whole Kingdom: this is the very Case before us.

This is against all reason, and against the Examples of the greatest, wisest and most absolute of Kings and Princes, who commanded their Judges to have no regard to any Commands of theirs, that were contrary to Law.

Vinius the Civilian, in his Commentary on the Imperial Institutes, fol. 16. gives this Rule, *Rescripta Principum contra Jus vel utilitatem publicam, Elicita à Judicibus improbari etiam ipsorum Imperatorum constitutionibus jubentur.*

Princeps non creditur (says he) *aliquid velle contra utilitatem publicam concedere*, 21 H. 8. c. 13. sect. 10, 11, 27. Dispensations for Pluralities, contrary to Act, are declared to be void, *Hob.* 82, 149, 146, 155. The King is never by Law supposed ill affected, but abused and deceived, for *Eadem præsumitur mens Regis quæ est Juris.*

Grotius de Jure belli & pacis, 112, 113. Amongst the *Persians*, the King was Supreme, yet he took an Oath at his entrance, and it was not lawful for him to change certain Laws made after a particular form.

If the King Establish the Decree, and Sign the Writing, it may not be changed, according to the Law of the *Medes* and *Persians*, which altereth not, as we read in the Book of *Daniel*, 6 Dan. 8. 12, 15.

By the Act of 2 E. 3. c. 8. it is accorded and established, that it shall not be commanded by the Great Seal, nor the little Seal, to disturb or delay Common Right, and tho' such Commandments do come, the Justices shall not therefore leave to do right in any point.

Grotius ubi supra, 117. Antiochus the third, sent a Rescript to the Magistrates, that they should not Obey him, in case he should command any thing against Law.

And Constantine published the like, That Orphans and Widows be not constrained to come to Court for Justice, no, not if the Emperor's Rescript be shewed.

In the story of *Daniel*, we read, that King *Darius* signed the Writing, and the Decree, which indeed was but a snare laid for *Daniel*, and *Daniel* had fallen into the snare: The King was his friend, but could neither dispence with him, nor pardon him, tho' he were sore displeased with himself for signing the Decree, And the King set his heart on *Daniel* to deliver him, and he laboured (says the History) an whole day, till the going down of the Sun to deliver him: he wanted such Judges as *Cambyses* had, to find out an Evasion; But the King himself sealed the stone that was laid upon the mouth of the Den with his own Signet, and with the Signet of the Lords, that the purpose might not be changed concerning *Daniel*.

Nihil opus est (says a learned Author, writing of the Government of England) *Licentiam dominandi in Rege Coerceri, quoniam quicquid in administranda rerum summa vel contra Patriæ leges vel minus ex populi commodo gestum fuerit Id omne Ministris Luendum rejicitur Adeo ut non ab adulatione sed ab æquitate summa fluxerit Notum Axioma apud Nostros. Rex Nunquam potest Errare aut cuiquam injuriam facere Quippe in Administros & Conciliarios quorum est Admonere Principem iniqua volenti, denegare operam, aut officio renunciare, potiusquam contra Leges quicquam jubenti parere tam culpa omnis quam pæna derivari solet & debet.*

And we have seen Examples of such in our times, many that have left good Places, rather than act against their Judgments.

There is a rare Example of this in the French History.

Lewis the Eleventh, King of France, at the Pope's importunity, had signed a Concordate for setting aside the Pragmatical Sanction which was made in defence of the Liberties of the Gallican Church, and the King had undertaken to the Pope, that his Parliaments should approve of what he had done, and the King sent a Command to the Parliaments accordingly, and required them to give a punctual obedience to his Order. The King's Advocate, *Johannes Romanus*, argued stoutly against it, and being threatned to be turned out of his Place for his pains, he said,

The King had freely bestowed that Office on him, and he would discharge it faithfully, as long as the King thought fit to continue him in it, and should be ready to lay it down, whenever it pleased the King: But he would suffer all things, rather then do any thing against his Conscience or the King's Honour and the good of the Kingdom: and out he went.

It will be admitted by those that argue for the Prerogative of Dispensing, that tho' the King, without the Parliament, cannot dissolve nor repeal, no nor so much as suspend the Law totally, tho' but for a time, but

Dr. Burnet's
Hist. of the
Rights of
Princes, 239.
K. James in
his Premoni-
tion to all
Christian
Monarchs,
298.
Objection.

but he may dispence with it, as to some particular persons, and for some limited time, and so the Law will still remain in force against all others.

Those that will argue thus, do yet hold, that the King is the sole *Answer.* Judge who are to be dispensed with, so that he is not limited to any number, nor to any time, so that tho' he may not in the gross dispence with the Law, yet he does the same thing by retail, which comes all to one, or it is in his Royal Will and Pleasure to do so: We are nothing beholding to the Judges if the King uses his Prerogative with moderation.

According to that sort of Argument that is called *Inductio*: which is a *particularibus ad Universalia progressus*. He that can dispence with A, B, C, and so with the 24 Letters, one by one, does in truth dispence with the whole Alphabet; but he must not do it *Uno Ictu*.

And we find it by Experience. What signifie those several Acts of Parliament that forbid a Judge of Assize to Execute that Office in the County where he was born or dwells, they are easily and daily dispensed with?

How many Acts have been made against pardoning of Murder, and to make void such Pardons, and what fruit have they had? Let us hear a learned Judge plainly speaking his experience and his mind in it: *Stamford*, in his *Pleas of the Crown*, fol. 101. says, that tho' there are words to null and make void these Charters of Pardon, yet by putting into the Charters of Pardon these words, *viz. Non Obstante aliquo Statuto in contrarium Editio*, the force of these Statutes is taken away, and not only of these, (says he) but also of all others, in which this Clause of *Non obstante* is put, and it is put (says he) in every Letters Patents.

And fol. 102. (he says) that the Statute of 13 R. 2. Stat. 2. c. 1. and the rest of the Statutes to the same effect, have always been destroyed by that Clause of *Non obstante*; and so false Suggestions have continued (says he) to this day without redress, and abound from one day to another, to the great detriment of the Publick Weal, and do not cease till Princes have more regard what Charters they pass; and he might have added, till the King's Attorney and Council at Law shall have more Fidelity and Courage.

I hear, that in justification of such a Dispensation as this, it was said *Objection.* in the Argument of the Case of Sir *Edward Hales*, in the Court of King's-Bench, That there is no Law whatever, but may be dispensed with by the Supreme Law-giver, as the Laws of God may be dispensed with by God himself, as appears by God's command to *Abraham*, to sacrifice his Son *Isaac*.

So likewise may the Laws of Man be dispensed with by the Supreme Legislator.

I fully agree to this, and have already argued upon this ground, That *Answer.* the Legislators (and no other) can dispence with their own Laws, and I have given several Instances and Examples wherein it was so practised; that is, by King and Parliament.

But does this justify the present Dispensation now in dispute? I agree the King hath a great and most eminent part in the Legislature, and in the passing of Laws, it is he that quickens the Embrio, and first gives

gives it Life, but under favour, and with all due Reverence to the King, I may affirm it, That the King hath not the sole Legislature, such as Almighty God hath over his Creatures, but the whole Kingdom hath a share in that Power, as I have fully proved, as well as the King.

I would cite one Case, not so much to prove what I have said herein, but rather to illustrate it: It was a Case in *Hill. 11 Jac. B. R. Dominus Rex*, and *Allen* against *Tooly*, in the Second Part of *Bulstrode's Reports*, 186, to 191. in an Information brought upon the Statute of 5 *Eliz.* for using the Trade of an Upholsterer, in which he had not served as an Apprentice Seven Years. The Defendant pleaded, That he was a Freeman of *London*, and that by the Custom of *London*, a Freeman might use any Trade; and he alledged that the Custom was confirmed *per Regem in Parlamento*. It was holden first, that there can be no good Act of Parliament, without the three Consents, *viz.* Of the King, Lords, and Commons. 2. That tho' divers Acts of Parliament do not specify these Three Assents, but only mention the King as *Dominus Rex Statuit*; and as it is in the Prince's Case, *Dominus Rex de Communi Concilio Statuit* (and the like): Yet when the Party will Plead, he ought to Plead it according to Law, and to set forth all the Assents, that is, of the King, Lords, and Commons: and this was the Opinion of the whole Court. Now Pleading is an exact setting forth of the Truth. We are not to raise Arguments from Forms of Speaking, but rather from exact Pleading, and the Resolutions of Judges: And tho' *Magna Charta* in the stile, seems to be spoken by *K. H. 3.* as by the word (*concessimus*); yet the Act of 15 *E. 3. c. 1.* recites that it was made a Law by the King, Lords, and Commons, and that what is said to be granted, was but their former Right. *Lambert's Archion*, 267, &c.

I hear, that in speaking to the Case of *Sir Edward Hales*, it was observed that by this Act of 25 *Car. 2.* there is no incapacity, or disability at the first, and upon the admission to the Office put upon any Person from taking of an Office, but that he is well admitted to it, and the Grant is good, and that time is given to take the Tests, and if by the times given he fail to take them, then he is to be disabled, and the Grants are to become void, but not before: Like a Condition subsequent that defeats the Estate, which yet was well vested; and then before the Grant is defeated, and the Party become disabled, the King's Dispensation steps in and prevents the Penalty and Disability: And herein (it was said) it differs from the Case of Symony, and buying of Offices, where the Interest never vested, but the Person was first disabled.

Answer.

There is indeed a difference, but none that is material, for it is all one whether the Party be disabled to take, or whether having well taken, and been well admitted, he is afterward disabled to hold, and retain, by not performing the Condition: For when he is first admitted, it is *sub modo*, and under a Condition, that if he fail to perform what the Law requires, his Office shall be void.

Argument.

Another Argument (as I hear it reported) was rais'd from the King's being a *Sovereign Prince*, and from thence it was inferred, that he might dispense with Laws that are Penal upon necessity, whereof he is the sole Judge.

The

The ground of this Argument, namely, That the King is a Sovereign *Answer* Prince; if it serve for the Point in question, it may also extend a great way further then to this question we have before us, it is hard to limit the extent of it, — it seems to speak that we must obey *without Reserve*.

The word (*Sovereign*) is *French*, and in *Latin* is *Supremus, id est qui in alios potestatem habet*: The Correlate whereof is, *Subditus*, or a Subject, and is attributed frequently to some sorts of Subjects, especially to the Heads or Superiours of Religious Orders.

But among us, tho' now frequently used in our humble Addresses to the King, or in our reverend mention of him, yet we find it very rarely, if ever, used in our ancient Acts of Parliament, or in our Law Books.

I find no mention of the very word among the many Attributes and Titles ascribed to Kings and Princes, in Mr. *Selden's* Titles of Honour: He hath that which is Synonymous, as *Supream Monarch*, as it signifies in opposition, or in distinction to Princes that are subordinate and feudatory, such as *Tacitus* speaks of, that the *Romans* (when their Government was Popular) had *instrumenta servitutis, Reges*. Or Tributary.

But properly, he is a King that is a Sovereign, and hath no Superiour upon Earth: According to *Martial*, *Rex est qui Regem (Maxime) non habeat*.

And such we freely and cheerfully acknowledge the King to be, and the best and most of his Subjects do swear that he is the only Supream Governour of this Realm, and of all other his Dominions, as well in all Spiritual, or Ecclesiastical, as Temporal Causes, and that no Foreign Prince hath any Power within this Realm. And I wish that all the rest of his Subjects would heartily take this Oath: but this among others, is that which Sir *Edward Hales's* Dispensation extends to.

Yet how from hence it can be argued that the King can dispense with his Laws, I do not see. I mean Laws of the same nature as that we have now before us.

Therefore those that used this Argument surely meant the word of (*Sovereign*) in another sense. *viz. Absolute & Solutus a legibus*.

If they mean by (*Sovereign*) a Prince that is absolute, and *solutus a legibus* (and they must understand it so, or else I do not see how it is pertinent to the present Argument) this is of a mighty Consequence, and ought to have been well considered before it had been used.

I find the word in this sense (as I take it) propounded in an addition or saving to the Petition of Right, 3 *Car. 1. viz. Not to infringe Sovereign Power*: But it was not liked, and upon Reasons given at a Conference, those that did propound it, were satisfied to lay it aside. It may be read in the Memorials of the *English Affairs*, fol. 10.

If the word (*Sovereign*) be meant in this sense, it is oppos'd by all our ancient Authors, Judges, and others, by plain and express Language, whose very Writings I have before cited, and I will but only touch upon them again.

Fleta says, *Superiorem non habet Rex in Regno nisi Deum & Legem per L. 1. C. 5. Legem factus est Rex*: This fully expounds the word Sovereign.

Both *Fleta* and *Bract*. and Sir *Gilbert Thornton* (who was Chief Justice in *Edw.* the First's time) take notice of that: *Jus Cæsareum*, or *Lex Regia*, as it is called by the Civilians, *Nec obstat quod dicitur quod*

Principi placet Legis habet vigorem : For it never was received in *England*, but in a restrained fence.

And with this agrees the ancient Coronation Oath, That the King shall hold the Laws and Customs of the Realm, *which the People have chosen*. But King *H. 8.* with his own hand, corrected the old Oath, to the effect following, *viz.* That he shall hold the Laws and Customs of the Realm, not prejudicial to his Crown or Imperial Jurisdiction: The Original of this Correction is in Sir Robert Cotton's Library †. See the History of the Reformation: Sir John Fortescue, sometime Chief Justice, and afterwards Lord Chancellor, in his Book *De Laudibus Legum Angliæ*: The Civil Law (says he) runs thus, *Quod Principi placuit legis vigorem habet, sed longe aliter potest, Rex politice imperans quia nec Leges sine subditorum assensu mutari poterit: Potestas regia Lege Politica cohibetur.*

‡ Archbishop Laud too did the like.

Sir Edward Coke, in his 12 *Rep. fol. 63, 64, and 65.* (says) It was greatly marvell'd that the Archbishop Bancroft durst inform K. James † that such absolute Power and Authority (as is there mentioned) belong'd to the King, by the Word of God, and there Sir E. C. cites the Sayings of these ancient Authors in our Law: But he says that the King was greatly offended with him.

† K. James I. in his Speech to both Houses, 1609, in his Works, fol. 533, says the King with his Parliament, are absolute in making or forming of any sort of Laws. Sir Walter Rawleigh's Hist. of the World, fol. 245.

A Learned Civilian gives some restraint even to the *Lex Regia* in this point: *Vinius* in his Comment upon the *Instit. fol. 381, Populus Romanus jura Majestatis omnia abdicative in principem transtulit, hinc Principes Romani Legibus soluti fuerant.* But he utterly opposes that Opinion of the School-men: *Principem Legibus solutum esse quoad vim coactivam sed etiam quoad vim directivam.* Rot. Parl. 11. R. 2. The King and Parliament declare, That the Realm of *England* never was, nor was it intended by the King and Lords, that ever it should be governed by the Civil Law.

In the deciding of the Great and Royal Controversie, in the time of K. E. I. concerning Right of Succession in the Crown of *Scotland*; it was debated by the Commissioners, according to what Law that Case should be determined; whether by the Law of *England*, or of *Scotland*, by the Civil Law, as being the *Jus gentium*, before the King of *England*, as being the Superior Lord: they all at last concluded, That the Civil Law by no means should be admitted: *Ne inde Majestatis Anglicanæ Juri fieret detrimentum.* Seld. dissertatio ad Fletam, 539.

Mr. Selden, mentioning John of Salisbury, who said, that in his time there were those that did prefer the Civil Law before all other Laws, especially, that *de absoluta principis potestate quæ in lege habetur Regia*; he says, it was meant of none but *de assentatoribus illius sæculi ex genere Hieratico, non de gente Anglicana aut de aliis qui Judiciis tunc præfuerunt*, It would have been far from any of the *English* Nation, especially from any of the Judges, to have maintained any such Opinion.

Seld. Dissert. 539.

But let it be understood (*sano sensu*) and in a proper and literal fence too, and it is very true and agreeable to our Law, *quod Regi placuit legis vigorem habet*; without the King's Placet, and his Royal Consent, nothing is Law amongst us. The Laws already in force, have had the Consent of his Predecessors, and no new Law can pass without the Royal Assent; nay, they are his Royal Words, *Le Roy le veut*, that first gives life to any new Law.

And the Judges Oath in the time of *H. 3.* was, that they should judge

judge *Secundum Legem & consuetudinem regni*; which words (as Mr. *Selden* there says) seem designedly to Exclude the *Jus Cæsareum* then lately brought in: whereof, as he says, some were fond in those times; and he tells us of what Order they were, but they were not Common Lawyers nor Judges, but the Hierarchy.

But should Judges give countenance to any such Law in the Latitude of it, they should be put in mind of what was done by King *Edward* the Confessor, which we are taught by Sir *Roger Twissden*, in his Preface to the Laws of *William* the First, annexed to Mr. *Lambert's* Treatise, *De prisicis Anglor' Legibus*, fol. 155. *Omnes* (says he) *qui Leges iniquas adinvenerant & injusta Judicia judicaverant multaq; concilia contra Anglos dederant, exlegavit*: such Enemies to the Laws of *England* should be put out of the Protection of the Laws of *England*. *Rode caper Vittem, &c.*

It is said amongst the Laws of King *Henry* the First, c. 28. (and it is in the very Body of that Law) *Lambert, ibid.* 186. *Gravius Lacerantur pauperes, à pravīs Judicibus, quam à cruentis hostibus.*

The Lords of Parliament, when any attempt is made to introduce the *Cæsarean* Law, (as once in the time of our K. *H.* 3. there was an endeavour to bring in part of the *Pontifical* Law) and it was by the Bishops, *Seld. Dissert.* I make no doubt but they will answer *Una voce*, as their Ancestors then did *Nolumus Leges Angliæ mutare quæ hucusq; usitatæ sunt & approbatæ.* fol. 537. *The Statute of Merton, c. 9. 2 Instit. fol. 96.*

The Act of 25 *Car.* 2. one of the principal Ends and Aims of it is, to keep out that Foreign Power, that would pretend to a Sovereignty or Supremacy over our Sovereign, but the Dispensing with this Law (which is maintained to be a Right incident to the Sovereign Prince) seems to be the likeliest way of setting up again that Pretence and Claim of a Foreign Bishop, which was so long usurp'd, and against which Pretence so many Acts of Parliament have been made, and which our ancient Kings did of old utterly renounce and disclaim, and we know the same Foreign Bishop hath made another Pretence to *England*, besides, that Ecclesiastical Power, by colour of a Resignation, made by King *John*. But King *Hen.* 3. Son and next Successor to King *John*, in the General Council at *Lyons*, Anno 1245. by his Ambassador and Advocate, made a Special Protestation against that pretended Resignation made to *Pandolphus*, *Pryn's Ser-* the Pope's Legate, (*Innocent* the Third) as a meer Nullity, *In quod nun-* cond Tome, *quam consensit Regni Universitas*, and afterwards upon the Pope's issuing fol. 290, 292, out of Process against K. *E.* 3. and the whole Kingdom, for the Homage 299. & 301, and the Arrears of the 1000 Marks Rent due to him. 302.

The Parliament declared, That King *John*, nor no other, could put himself or his Realm into such a subjection, *without their consent.* 46 E. 3. Rot. Parl.

And that it was against the Oath King *John* had taken at his Coronation. nu. 7. 8.

This Record expounds the word (Sovereignty) in the true sense of it, namely, that our Sovereign is no way subject to the Bishop of *Rome*, or to any Foreign Power. But it doth no way import, that the King can dispose of his People *ut placuit Regi*, or alter the Government, without the Peoples consent, nor dispence with his Coronation-Oath, but proves the quite contrary.

A
Short Argument
 UPON THE
PLEADINGS
 Of the aforementioned
CASE of Sir EDW. HALES.

THE first Point argued by the Plaintiff's Council was, That it appears by the Declaration, and it is now confess'd by the Defendant's joyning Demurrer, that *the Defendant hath been Indicted* for this Offence, in exercising the Office of a Colonel, without having taken the Tests.

And upon the Indictment he either did plead this Dispensation, or might have pleaded it. And he is *now Convict*, according to the direction of the Act of 25 Car. 2. so that he now comes too late to plead it to this Action: for he cannot falsifie the Conviction, nor averr any thing against the Record of it, and bring the Fact to be tryed over again in this Action; but is concluded and estopp'd in Law to say any thing to the contrary of that Record, by which he is found guilty of the Offence against this Act of Parliament.

The Defendant either did plead this Dispensation or Pardon to the Indictment, in discharge of the Indictment, and it hath been over-ruled by the Judges at the Assizes, (as by Law it ought to be, being no good Plea:)

Or he might have pleaded it, if he had been advis'd it had been a good Plea. And not having done it, he hath elaps'd his time, and now comes too late to plead it, being Convict of the Crime.

To this it was *objected*, (as I hear) That the Plaintiff, if he will take the advantage of an *Estoppel*, ought to have set it forth by way of Replication to the Defendants Plea, and to have *relied* upon it. *Object.*
Estoppel.

For the Rule is, That he that pleads an Estoppel, must rely upon it as an Estoppel.

It is true, if a man will plead an Estoppel, he must rely upon it. *Ans.*

But in this Case the Plaintiff does not plead the Estoppel, but the Estoppel appears by the Declaration, and the Defendant's own Plea together: so that there was no need for the Plaintiff to set that forth by way of Replication; which doth sufficiently appear by the Defendant's

own Plea, *viz.* That he did not take the Tests within the time limited by the Act, and the Conviction is confes'd by his Plea, and joyning in Demurrer.

If a man recover a Debt upon a Bond, and before Execution dies, if his Executor sue a *Scire Facias* upon that Judgment, the Defendant cannot plead any Plea that he might have pleaded before, as *Non est factum*, or by *Dures*, or the like: for he is concluded by the Judgment.

In *Jason and Ketes Case*, in *Siderfen's Reports*, fol. 43. by *Bridgman*, Chief Justice, a man shall never help himself by *Audita querela*, (tho' that is an equitable Suit at Law) for any matter that he might have pleaded before.

Object. 2.

Here is no Estoppel.

Answ.

There is no Estoppel in this Case: for the Conviction is upon an Indictment, which is the *King's Suit*; and this is the *Suit of another*, *viz.* the now Plaintiffs, and so they are *two distinct Suits*.

The Conviction upon the Indictment, is an Estoppel against the Defendant himself; of which any man may take the advantage, and he himself shall never be admitted to averr against it. As in *Maynyes Case*, in *Leonard's first part*, fol. 3.

A Stranger may take the advantage of this Estoppel.

An Attainder for Treason is an *Universal Estoppel*, of which any Stranger may take the advantage, not only against the Party attainted, but against his Wife too, if she sue for Dower. And it does not run in Privy. By *Manw. Ch. Bar.*

7 E. 4. 1. Br. Estoppel 163.

Knoil & Heymer's third Kebk. 528. by Chief Justice *Hale*.

That a Stranger cannot falsifie a Verdict.

Rel. Abr. first part, 362.

Dr. and Stud. 68. à ad fin. C. b.

Object. 2.

As to that which is objected, that the Conviction is upon an Indictment (which is the *King's Suit*) but this is another Suit; and therefore the Verdict shall not conclude the Defendant in this Suit.

Answ.

A dependant Action.

This is *not another Suit*, but in effect an Execution upon the Conviction, and grounded upon that Record; and therefore not meerly a new Suit, but a *dependant Action*; as a Writ of *Error*, or an *Audita querela*; or a *Scire Facias* upon a Record, are dependant Suits, or an *Action of Debt* upon a Judgment.

The Act of 25 *Car. 2. c. 2.* hath made it Criminal in any person, after his neglect of taking the two Oaths, or of the Sacrament, by the times limited, to execute any such Office or Place of Trust: and for such Offence hath made him indictable at the *Assizes*; and upon a Conviction the Offender incurs (among other Penalties) the forfeiture of 500 *l.* and gives it to any one that will sue for it in an *Action of Debt*.

So the Statute hath directed the method of trying the Offence, and of convicting the Offender, by Indictment at the *Assizes*.

And if he that sues for the Forfeiture shall be driven to prove the Offence over again, then the *Conviction at the Assizes serves for nothing*, but was

was all in vain. And such Construction defeats the intention of the Law-makers, for they intended this for the only Tryal, and not to have several Tryals; for suppose it should be tried again in this Action, and a Verdict pass for the Defendant, here shall be Tryal against Tryal, and *Verdict against Verdict*. And such Construction ought to be made of Acts of Parliament, as may not elude, but agree with the intent of the Law-makers; and so, as that no Words, Clause, or Sentence, shall be altogether idle and insignificant.

And this *Conviction* upon the Indictment, is *the very ground of the Action of Debt* brought by the now Plaintiff: for the words of the Act are, *And being thereupon lawfully Convicted upon any Indictment, every such person shall from thenceforth forfeit 500 l.*

So that till there be such a Conviction, there is no Forfeiture incurr'd of 500 l. nor no Action can be brought for the 500 l. The Offence must be prov'd and determin'd, before any Action can be brought; and therefore the proof of the Offence whereof the Defendant is convict, must not be made in this Action over again: if it must, what serves the Conviction for?

Suppose the Plaintiff here had brought his Action, after the neglect of the Defendant of taking the Oaths, and of receiving the Sacrament, and his acting in his Office after such neglects, and *before any Conviction* upon Indictment, and had only averr'd, that the Defendant had so neglected, and yet acted; would this Action have been well brought? Or, suppose there had been a Conviction, but the *Plaintiff had not set it forth* in his Declaration, but had only averr'd the Offence committed; would this have been a good Declaration? Surely it would not: This proves, that the Record of the Conviction is the very ground and foundation of this Action, and the Action would not lie without such Conviction: so that it is not a *meer new Action*, but a *dependant Action*.

And the usual difference is where the Action is a *dependant Action*, depending upon a Record, and grounded upon it; and where it is a *collateral Suit*, not depending upon that Record.

An Action dependant or collateral.

An Action against the Sheriff for an Escape of one taken in Execution, this is a dependant Action, and is grounded upon the Record of the Judgment given against the Party that escap'd. The Sheriff cannot aver any thing against that Record, and examine it over again; nor can he take any advantage of Error or erroneous proceeding, in obtaining that Judgment. * *Saunders Rep.* 2 part. 101.

So in an Action of Debt, grounded upon a Judgment, or in an *Audita querela* to be reliev'd upon a Judgment.

* *Jaques versus Caesar.*
And *Dr. Drury's Ca.* 8 R. 142.
And *Mac-kelly's Ca.* 9 R. 68.

And so in our Case, this Action of Debt for the 500 l. is grounded upon the Conviction, which must stand for truth, as long as it remains in force not avoided by Error or Attaint.

A *Writ of Error* to reverse a Judgment, is a dependant Action: In error, the Plaintiff may not averr any thing against the Record. *Mul-lens versus Weldy. Siderfin's* 1st part 94. Error was sued in the *Kings-Bench* to reverse a Judgment given in the *Palace-Court*. And the Plaintiff in Error assign'd for Error, that the Duke of *Ormond* (who is principal Judge of that Court by Patent) was not there. It was agreed by the Court, that it might not be assign'd for Error, for it was contrary to the Record.

But

But *per Cur.* in an Action of Trespass, or false Imprisonment, which (says that Report) are *collateral Actions*, he may falsifie and assign that, if he be taken upon such Judgment.

So if a man be indicted and convicted of an *Affault and Battery*, and afterwards the person so assaulted brings his Action for the Battery, this hath no dependance upon the Indictment or Conviction, for it may be sued, though there were no Indictment, but is a distinct and *collateral Suit*. The Indictment and Verdict is no Estoppel, nor can so much as be given in Evidence, as is held by the whole Court in the Case of *Sampson versus Tardley*, and *Totkill*, 19 Car. 2. B. R. *Keble's* 2 part, 384. The like in an *Appeal of Murder*. *Keble's* 2 part, 223.

Another Penalty upon the Offender against this Statute of 25 Car. 2. is, That he shall *be disabled to sue* in any Action. Now suppose a person convicted at the Assizes sues an Action, may not the Defendant in that Action take the advantage of *that Disability*. and plead *the Conviction*? As in Case of an *Outlawry* pleaded in *Disability*, there need not be set forth all the proceedings in that Suit wherein the Plaintiff was outlawed, but he may plead the Record of the Outlawry, and rely upon it, and it shall not be examin'd whether there was any just cause to sue him to the Outlawry, or not.

The Indictment, the Defendant's Plea to it, and the *Verdict* upon it, have determin'd the matter of Fact, that the Defendant is guilty of the Offence against this Act of Parliament.

The Act it self hath pronounc'd the *Judgment*, which consists of many particulars; one whereof is, That the Defendant shall *forfeist* 500 *l.* to him that will sue for it. And the Action of Debt for the 500 *l.* brought by the Plaintiff, grounded upon all these, is in the nature of an *Execution*.

And all these put together, are not severall and distinct Suits, but in effect all but one Suit, and Process, one depending upon the other.

The second Point is, Whether the Dispensation pleaded by the Defendant, be a good Bar to the Action of Debt? And this is properly called, The Matter in Law, and the great Point of the Case? for which I refer the Reader to my Argument at large.

POSTSCRIPT:

BEING SOME

Animadversions

UPON

A Book writ by Sir EDW. HERBERT,

Lord Chief Justice of the *Common Pleas*,

ENTITLED,

*A short Account of the Authorities in Law, upon which
Judgment was given in Sir Edward Hales's
Case.*

SINCE the finishing of my Argument about the Power of Dispensing with Penal Statutes, a Book came to my hands touching the same subject, entituled, *A short Account of the Authorities in Law, upon which Judgment was given in Sir Edward Hales his Case*; written by Sir Edward Herbert, Chief Justice of the *Common Pleas*, in vindication of himself.

And although I am of opinion, that the substance of all the Arguments contained in the said Book, are fully answered in my afore said Discourse, yet I hold it necessary to make some Animadversions upon the said Book, and to point out readily to the Reader the several Pages of my Discourse, wherein the Arguments of the Chief Justice are more directly and particularly treated of, and answered.

And there being great Reverence justly due to a Person that bears so high a Character, as also to a Judgment given in that Superiour Court of the King's Bench, and by advice of all but two of the rest of the Judges, as I now hear, some short Apology had need be used for that freedom I have taken to animadvert upon it, being (as I am) but in a private station.

In short therefore, I have not undertaken it out of any vain conceit of my own Abilities, but out of a sincere desire to inform such as in the approaching Parliament are like to have this great Case in Judgment before them; and some may possibly not be at leisure (as I have been) to study the Case, the matter being of a mighty importance.

Nor have I entred the Lifts upon any contentious humour, or taking any advantage of the late Happy Change of publick Affairs. I am (I thank God) more inclin'd to commiserate the Distress that may befall any persons by the change of the times (it having been my own case so lately) although they differ from me in Judgment or Interest. I am very far from insulting over any, whatever hard usage I my self have met with.

*Nemo confidat nimium secundis,
Nemo desperet meliora, lapsus.*

O

My

My Apology is this :

1. I was engaged in the Argument before the coming forth of this Book, and it happening into my hands before my publishing of my Discourse, I could not decline the observing something upon it, without being suspected to have given up the Cause.
2. The Lord Chief Justice himself hath by his Book given fresh occasion fairly to discuss the point again, by declaring that he expects (as we all do) that it will receive a disquisition in Parliament.
3. And as the Chief Justice hath endeavour'd (with as much as can be said) to give the World satisfaction in the justice and right of the Cause to maintain the Judgment given ; so he is well known to be of that ingenuity and good temper and candour, as willing to receive a satisfaction, if any further Argument to the contrary may be so happy as to convince him.

The Chief Justice *Herbert*, pag. 6. gives us the Definition of a Dispensation out of Sir *Edward Coke's* 11th Report, fol. 88. viz. *Dispensatio mali prohibiti est de jure Domino Regi concessa, propter impossibilitatem providendi de omnibus particulatibus.*

And again, *Dispensatio est mali prohibiti provida relaxatio utilitate seu necessitate pensata.*

Upon the word (*Concessa*) I would gladly be satisfy'd when or by whom that Power was ever granted to the King; where shall we find that Grant?

It is clear, that whoever hath the entire Power of making a Law, may justly dispense with that Law. And therefore Almighty God being the sole and supreme Law-giver, might dispense even with the Moral Law; as he did with the sixth Commandment, when he commanded *Abraham* to sacrifice his Son *Isaac*; and with the eighth Commandment, when he commanded the *Israelites* to borrow the Jewels of the *Egyptians*, and to go away without restoring of them.

But it stands not with reason, that he who hath but a share with others in the making of a Law, (as the King hath no more) should have the power by himself alone to dispense with the Law, unless that power were expressly intrusted with him by the rest of the Law-makers (as sometimes hath been done.)

Sir *Edward Coke* in his seventh Report, in the Case of *Penal Statutes*, fol. 36. towards the lower end, does affirm, that this Dispensing Power is committed to the King **By All his Subjects**: So that it is not claimed *Jure Divino*, but by Grant from the *People*. But where to find any such Grant, we know not.

I have (as I conceive) made it appear in my larger Argument, p. 14. that the first Invention of Dispensations with Laws, began by the Pope, about the time of *Innocent* the Third, and by our King *Henry* the Third, in imitation and by encouragement from the Pope; so that it was not by the Grant of the People, but ever exclaimed against by all good men, and generally by all the people, and ever fenced against by a multitude of Acts of Parliament.

It is true, the Dispensing with Laws hath ever since been practised; and they began at first here in *England* to be used only in Cases where the King alone was concern'd, in Statutes made for his own profit, wherein he might have done what he pleas'd. But it is but of latter times that they have been stretched to Cases that concern the whole Realm. See my Argument, fol. 13. Hence it evidently appears, it cannot be a legal Prerogative in the King; for that must ever be by Prescription, and restrain'd to those Cases that have been used time immemorial, and must not be extended to new Cases.

Now there hath been no such usage as will warrant the Dispensing with such an Act of Parliament as is now before us: that of 25 *Car. 2. c. 2.*

The Chief Justice *Herbert*, from the Definition before recited, and those two Authorities of Sir *Edward Coke* in his Case of Monopolies, and that other

other of Penal Statutes, frames an Argument to prove, that the Dispensation granted to Sir *Edward Hales*, was good in Law.

Because a Dispensation is properly and only in case of a *Malum Prohibitum*, he thence infers, that the King can dispense in all Cases of *Mala Prohibita*.

Which is a wrong Inference, and that which Logicians call, *Fallacia à dicto secundum quid ad dictum simpliciter*. Because he can dispense with some, that therefore he can dispense with all, is no good Consequence.

It appears by the late Chief Justice *Vaughan's* Reports, in the Case of *Thomas and Sorrell*, (so often cited by the Chief Justice *Herbert*) *Vaughan's* Rep. fol. 333. the fourth Paragraph, that his Opinion is, That the King cannot dispense with every *Malum Prohibitum*; and he gives many Instances of such *Mala Prohibita* that are not dispensable, fol. 342, and 334. parag. 4.

Therefore the Lord Chief Justice *Herbert*, should (as I conceive) regularly first have given us the distinction of *Mala Prohibita*, into such as are dispensable, and such as are not dispensable; and then have shewn, that the Dispensation granted to Sir *Edward Hales*, fell under the first part: but that learned Reporter, (the chief Justice *Vaughan*) (so often cited by our now Lord Chief Justice) in the aforesaid Case of *Thomas and Sorrell*, fol. 332. the last Paragraph gave one, quarrels with the very distinction of *Malum Prohibitum*, and *Malum in se*, and says it is confounding.

From whence I would observe, and from the whole Report in *Thomas* and *Sorrell's* Case, that the Notion of Dispensation is as yet but crude and undigested, and not fully shaped and formed by the Judges.

The Pope was the Inventor of it. Our Kings have borrowed it from them. And the Judges, from time to time, have nursed and dressed it up, and given it countenance. And it is still upon the growth and encroaching, till it hath almost subverted all Law, and made the Regal Power Absolute, if not Dissolute.

I must agree, that our Books of late have run much upon a Distinction, viz. Where the breach of a Penal Statute is to the particular damage of any person, for which such person may have his Action against the Breaker of that Law, there tho' it be but *Malum Prohibitum*, yet the King cannot dispense with that Penal Law; according to the Rule in *Bracton*:

Rex non potest gratiam facere cum injuriâ & damno alterius.

As for instance: There are several Statutes that prohibit one man from maintaining another's Suit, though in a just Cause. See *Poulton de pace Regis & Regni*, in his Chapt. of *Maintenance*, fol. 55.

Now it is held, that the King cannot dispense with those Laws, because it would be to the prejudice and damage of that particular person, against whom the Suit is so maintain'd by another: for there can be no maintenance, but it is to the wrong of a particular person.

So of carrying a Distress out of the Hundred.

But there are many other Penal Laws, where by the transgressing of them, no Subject can have any particular damage, and therefore no particular Action for the breach of them.

As upon the Statute that prohibits the Transportation of Wool, under a Penalty. By the breach of this Law, that is, by the Exportation of Wool, no one particular man hath any damage, more than every other man hath; but it is only against the Publick Good.

And the breach of such a Penal Law is punishable only at the King's Suit, by Indictment or Presentment.

And the like, where such a Penal Statute gives an Action Popular, to him that will sue for the Penalty, who hath no right to it, more than any other, till his Suit be commenced.

In these Cases (it is commonly held) that the King may dispense with such Penal Statutes, as to some particular persons, and for some limited time, (whereof they make the King the sole Judge) because, as the reason is
given

given in the Chief Justice *Vaughan's Reports*, fol. 344. parag. 2. Such offence wrongs none but the King. This is now the common receiv'd Opinion and Distinction. And the breach of such kind of Penal Statutes, are said to be only the King's damage in his publick capacity, as Supream Governour, and wronging none but himself. Lord *Vaugh.* Rep. 342. parag. 3.

But if we will narrowly search into this Distinction, and weigh the Reasons so given, we shall find it is without any just ground.

The damage done to the particular person in the Cases past, in the first part of this distinction, are meerly his own proper and peculiar damage; and he is intituled to his particular Action for it, in his own proper personal Right: and therefore, if he discharge and dispense with them, it is no wrong to any other man. He may do what he will with his own.

But the Cases in the second part of this Distinction, are where the King hath a right to the Suit, and the offence and damage are said to be to him only.

But are they so (as the former) in his own personal right, as his Lands and other Revenues are? or are they to him but as a Trustee for the Publick, for which reason he is called *Creditor Pene*? and may he therefore upon the like reason, dispense with them, or dispose of them, as a Subject may do with his own particular Interests?

Again, Shall a publick Damage and Injury to the whole Nation, be more dispensable by the King, than the loss of one private man?

—*fuit hac sapientia quondam*
Publica privatis secernere—

And therefore in my apprehension the King cannot in such Cases of Dispensations, be truly said to wrong none but himself; and it is not agreeable to the Definition before given, *Utilitate Compensata*, for the King wrongs the whole Realm by it. Where if he grants a Dispensation with a Penal Law of the first sort of this distinction, he only wrongs some particular persons.

The Cases and Authorities for Dispensations in our Books that were granted in ancient times, will generally be found to be only where the Penal Statutes were made for the King's own proper interest and benefit: As his dispensing with the Statute of *Mortmain*. For in such Cases it was to the King's own loss only, in Cases where the King might by Law have given away his Lands or Services. So the King may in his Patent of Grant of Lands, dispense with the Statutes that require there shall be mention of the true Values of them. And by a *Non-obstante* to those Statutes (which is now generally used) the King does in effect declare, that it is his pleasure to grant those Lands, whatever the Value of them be more or less: and the Statute does by express words save a liberty to the King in that Case.

The King is not a Trustee for others in such Cases, nor can these Dispensations be said to be directly to the damage of the Publick. And such Penal Laws as meerly concern the King's own Revenue or Profit, may justly be thought to be intended to be made only to put the King's matters into an ordinary method and course, and so save the King a labour, as the Lord *Hobart* says; and so prevent the King's being surpriz'd or misinform'd, when Patents are gained from him, and not design'd to tie the King's hands, or to restrain his power: as out of all doubt was done and intended by the Law-makers in our Act of 25 *Car.* 2.

But in all the late Cases and Authorities which we meet with in our Books concerning *Non-obstante's*, and Dispensations, as in the time of King *Henry* the Seventh, and so downward to this day, we shall find them practising upon such Penal Statutes as meerly concern the Publick Good and Benefit, and the Laws of such a nature, by the breach of which the whole Nation suffers: While some particular persons, it may be, by giving a large Fine, or a yearly Sum, obtain the favour to be dispens'd with and exempt from a Penal Law, while all others continue to be bound by it.

As

As for Example : Where a Statute forbids the Exportation of Wool, or of Cloth undyed or undress'd, under a Penalty ; such a Law is greatly for the Publick Good, and it takes care that our own People shall have Employment and Maintenance. Yet this is such a Law, as according to the receiv'd Distinction, the King may dispense with, there being no particular damage to one man more than to another, by breach of such a Law, although it be a mighty damage to the whole Nation : For by such a Dispensation, the person so dispens'd with to Export such White Cloth undyed, will have the sole Trade, which before the making of that Penal Statute, was equal and common to all. I wish the House of Commons would enquire what vast Riches have been heretofore gotten by such as have obtain'd the Dispensations with this Penal Statute, besides the Sums they paid to the Crown for them. These are meer Monopolies.

In such a Case it may rightly be applied, That *Sin takesb occasion by the Law*. It had been better for the Nation, that such Laws were never made, being no better observ'd : for here again the Dispensation is neither *Utilitate*, nor *Necessitate pensata*.

Look into the Case of *Thomas and Sorrell*, and you will find few or no Cases of Dispensations cited out of our Books, but of the time of King *Henry* the Seventh, and much more of very late times : so that the ill practice is still improving and stretching.

The Lord Chief Justice *Herbert*, in the next place, *pag. 9.* proceeds to mention the great Case of *2 Hen. 7.* a Resolution of all the Judges in the Exchequer-Chamber, upon the King's dispensing with the Statute of *23 H. 6. cap. 8.* That no man should be a Sheriff above one year. This is the great Leading Case and Authority, upon which the main stress is laid to justify the Judgment given in *Sir Edward Hales* his Case.

I would avoid repeating what I have already so largely said to this Authority, to which I must refer my Reader, by which I hope it is most evidently made out, that the King neither hath, nor never had any just Right or Power to elect Sheriffs : But the right of Electing was anciently and originally belonging to the Freeholders of the several Counties ; and since it was unjustly taken from them (as they have ever been on the losing hand) it hath been lodged in the great Officers of the Realm, as the Lord Chancellor, Lord Treasurer, Lord Privy-Seal, and the Judges, &c. as appears by the several Statutes.

And they are to make such Choice every year in the Exchequer, on a day appointed by the Statute for that purpose. So that the Sheriffs are by those Statutes to continue in their Offices for one year only. And the King cannot hinder such Election.

Only by his Patent or Commission to the Sheriff, hath he used to signify to the Sheriff himself that is so chosen, and to publish to all others, who the person is that is so chosen. This is all the use of the Patent ; but it is the proper Election of those great Officers that truly vests them in their Office.

And it does as clearly appear, that when former Kings have dispens'd with a Sheriffs continuing in his Office for longer than one year, contrary to the several Statutes so forbidding it, the King hath so done it by virtue (not of his Prerogative) but by a special Act of Parliament enabling him to do it, for some extraordinary occasions, and for some limited time only. See for this the Statute of *9 Hen. 5. cap. 5.* in the Statutes at large, and my larger Argument, *fol. 34.*

The truth is, the Power of Dispensing is originally in the Legislators. He only can dispense with a Law, that can make a Law. The Power is equal ; and the Legislators can confer the same Power upon the King or any others, for some convenient time, &c. as appears by the last Instance of the Sheriff, and divers other like Cases, mentioned in my foregoing Argument, where I have also observ'd many other things upon that Resolution of *2 H. 7.* concerning Sheriffs.

The Chief Justice *Herbert* supposes the Mischiefs recited in the Preamble of that Statute of 23 *Hen. 6.* cap. 8. concerning Sheriffs continuing in their Offices longer than one year, to be equal, if not greater (as he judges) than the Mischiefs recited in the Statute of 25 *Car. 2.* by Papists being in Offices. And from thence, I presume, would infer, that the Case of Sir *Edward Hales* is not so fatal in the consequence, as the Case of a Sheriff.

I may appeal to any ordinary Judgment, and to the sad Experience and Tryal we have so lately had, and to the desperate Danger we were so lately in (from which Almighty God, by no less than a Miracle hath in great mercy deliver'd the Nation) whether the Mischiefs that could any way possibly arise from the dispensing with the former, (I mean, the Statute concerning Sheriffs) be comparable to the infinite Mischiefs arising from putting Papists into Office, and intrusting them with our Religion, and all our Civil Rights.

Page 10.

The Chief Justice, upon those words of the Statute concerning Sheriffs, *viz. That no Non-obstante shall make them good*, infers, that those words do shew, that the Parliament which made that Act concerning Sheriffs, was of opinion, that had it not been for that Clause, the King could otherwise have dispens'd with that Act by a *Non-obstante*.

Ans. This to me seems a strained Inference, and that it is very far from shewing any such Opinion in that Parliament. It rather signifies, that had not the Parliament inserted that Clause into the Act, the King might have done again as he had frequently practis'd before, *viz.* granted Dispensations upon that Statute: which ill practice they endeavour'd to prevent for the future, not approving the practice, nor owning the power of doing it. *Ex malis moribus bonæ oriuntur Leges.* A good Law rather condemns a contrary practice before used.

I heartily desire my Reader (as I have done in my foregoing larger Argument) carefully to observe and examine of what sort and nature those several Cases are, which the Resolution of the Case of 2 *Hen. 7.* urges to warrant that Resolution. As those Cases concerning the true Value of Lands, which the King grants; and that concerning the shipping of Wool to a certain Staple, &c. and let the Reader judge how vast a difference there is between those Statutes in the nature, and import, and reason of them, and this weighty important Statute now before us; and how little that Resolution of 2 *H. 7.* can be warranted by the Cases there cited, being of so inferiour and minute a Consideration, in comparison of the principal Case.

It is true, Sir *Edward Coke* (if the twelfth Report, which goes by his name, be truly his) hath since that Resolution given in 2 *Hen. 7.* found out new and different Reasons and Arguments, which are not urged, and therefore I presume never so much as thought on, at that time, by the twelve Judges who gave the Resolution in that Case of 2 *Hen. 7.*

Thus says Sir *E. Sandys*, in his Relation of the Religion used in the West parts of the World: Those of the Roman Religion made their Greatness, Wealth, and Honour, to be the very Rule by which to square out the Canons of their Faith; and then did set Clerks on work to devise Arguments to maintain them.

Sir *Edward Coke* seems to justify that Resolution concerning Sheriffs, from this ground, *viz. That the King hath a Sovereign Power to command any of his Subjects to serve him for the Publick Weal.* And this is (says he) solely and inseparably annexed to his Person, and that this Royal Power cannot be restrain'd by any Act of Parliament. 12 Rep. fol. 18.

That it is not solely annex'd to the King's person, appears by the several Acts of Parliament which I have cited to this purpose in my larger Argument, fol. 34. where the Power of Dispensing with some particular Acts, was given to the King by the Parliament, and by him accepted for some short time. And the whole Parliament have in divers Cases themselves exercis'd this very Power.

Judge of the weight of the Reasons said to be given there by Sir *Edward Coke*, by that one Instance of his in the Case he puts of *Purveyance*, 12 Rep. fol. 19.

fol. 19. which (he says) cannot be taken from the King, nor not by Act of Parliament.

Yet we have lived to see it lately taken away by Act of Parliament; which in the Judgment of a Parliament (which is of the highest Authority in Law) may therefore be taken from the King.

And is the King in truth restrain'd from commanding his Subjects to serve him for the Publick Weal, either by those Statutes that disable Sheriffs to continue in their Offices longer than one year, or by our Statute of 25 Car. 2. that disables Popish Recusants to bear publick Offices: Because some very unfit, incapable, and dangerous persons are disabled to bear Offices of Trust and Power, (and this by the King's own consent to the Act, and by the advice of the great Council the Parliament) and indeed of the whole Realm?

Does the King by this (which the Judges mis-call a Restraint) want for choice of fit persons to serve in Offices? Doth the Publick Weal suffer by this Restraint? is it not rather preserv'd by it? Hath not the King Protestant Subjects enow to bear Offices? And are Popish Recusants (who account Protestants Hereticks, and to be rooted out and destroy'd, and with whom they hold no Faith is to be kept, and against whom they have been continually plotting Mischief) are these the fittest to be intrusted with the Defence of the Protestant Religion, and with our Lives and Estates, which are all concern'd, more or less, in every Publick Office and Trust?

And are those persons (the Papists) that have a dependance upon the See of Rome, and a Foreign Power, fit to be intrusted with the power of the Nation, with the Militia, and the Sea-Ports?

Is not this to commit the Lamb to the custody of the Wolf?

This Act that disables Papists to bear Offices, cannot be justly said to be a Restraint upon the King; that expression sounds ill, and takes the matter by the wrong handle. It rather imports the King's Declaration and Resolution, by advice of his great Council, to employ none in Offices and Places of Trust, but such as are most capable and fit, and will most faithfully answer the great Ends for which they are so intrusted, that is, the preservation of the Protestant Religion, which is the true English Interest.

And this agrees with the Rules of the Common Law, That if an Office be granted to one that is *Indonem*, the Grant is void, though granted by the King himself. Of this I have treated more largely, in my Argument, fol. 57.

The Lord Chief Justice *Herbert*, pag. 16. asks the Question, Whether so many solemn Resolutions of all the Judges of *England* in the Exchequer-Chamber, are not to be rely'd upon for Law? And I answer, That if they were ten times as many more, yet they are not to be rely'd on against many express positive Acts of Parliament directly to the contrary. For what words could the Parliament use more emphatical and express, and more to the purpose, than by saying, That a *Non-obstante*, or a Dispensation, or a Grant of such a thing, (prohibited by that Law) shall be absolutely void, and *ipso facto* adjudged void, and the person made incapable to take? And is not a Judgment in Parliament, and by Act of Parliament, of the highest Authority?

But (says the Chief Justice, fol. 16.) the constant practice hath been to dispense with the Statute of Sheriffs. I answer, It hath also been a very frequent practice too for the King, to make such persons Sheriffs, as were none of the number nominated or chosen, as aforesaid, by the Chancellor, Treasurer, Judges, and other great Officers; and it passes for current that he may so do, though it be a vulgar Errour: For it hath been resolv'd by all the twelve Judges, to be an Errour in the King. See Sir *Edward Coke's 2 Instit.* or *Magna Charta*, fol. 559. and yet it is practis'd to this very day.

The Chief Justice, pag. 18. seems to excuse Popish Recusants, for not qualifying themselves for Offices, by taking the Oaths and the Test, &c. for that no man (says he) hath it in his power to change his opinion in Religion as he pleaseth, and therefore it is not their fault. It is an Errour of the mind, &c.

Ans.

Ans. Here is no occasion taken to find fault with them for their Opinion ; let them keep their Religion still, if they like it so well, who hinders them ? This Act of 25 Car. 2. imposes no Penalty upon them for their Opinion. But is there any necessity of their being in Offices ? Must they needs be Guardians of the Protestant Religion ? The Penalty upon them by this Act, is not for their Opinion, but for their presuming to undertake Offices and Trusts, for which they are by King and Parliament adjudg'd and declar'd unfit.

Page 20, & 21. The Chief Justice *Vaughan* is brought in, arguing for the King's Power of Dispensing with (*Nominal*) Nuisances, (as he is pleas'd to call and distinguish Nuisances). The word (*Nominal*) (as there understood) imports, that though a Parliament declares any thing to be a Nuisance, (as sometimes they do in Acts of Parliament, to render them indispensable) which yet in its proper nature would not otherwise be so conceiv'd to be ; that such a Nominal Nuisance (as he holds) may however be dispens'd with by the King, though regularly by Law the King may not dispense with any Nuisance.

Ans. Shall any single or particular person, though a Chief Justice, presume to call that a meer *Nominal Nuisance*, which a Parliament by a solemn Act and Law have adjudg'd and declar'd to be a real Nuisance ? Are we not all concluded by what a Law says ? This Arrogance is the Mischief now complain'd of.

The Chief Justice *Herbert*, pag. 22. at the lower end, says, That from the abuse of a thing, an Argument cannot be drawn against the thing it self. I agree this is regularly true ; yet we have an Instance to the contrary in the Scripture, in that point of the *Brazen Serpent*. But in our Case the abuse doth arise from the very nature of the thing it self, from the constitution of it.

For the King practises no more in dispensing, than what these Resolutions of the Judges allow him to do by this pretended Prerogative. The Error is in the Foundation.

They have made his Power to be unlimited, either as to number of persons, or as to the time how long the Dispensation shall continue. Sir *Edward Coke* says, and so the other Books, That the King is the sole Judge of these.

Nec Metas Rerum, nec Tempora Ponunt.

The Chief Justice *Herbert*, fol. 24. cites two clear Concessions (as he is pleas'd to call them) of all the Commons of *England* in Parliament, which he esteems much greater Authorities than the several Resolutions of all the twelve Judges.

But how far these are from Concessions, will easily appear to an indifferent Reader. They are no more than prudent and patient avoiding of Disputes with the several Kings. And there are multitudes of the like in the old Parliament-Rolls.

It is but an humble clearing of themselves from any purpose in general, to abridge the King of any of his Prerogatives, (which have always been touchy and tender things ;) but it is no clear nor direct allowance of that dispensing there mention'd, to be any such Prerogative in him.

However, I am glad to see an House of Commons to be in so great request with the Judges. It will be so at some times, more than at others.

Yet I do not remember, that in any Argument I have hitherto met with a Vote or Order, or Opinion of the House of Commons, hath been cited for an Authority in Law, before now. Will the House of Peers allow of this Authority for Law ?

It will be said, That this is but the acknowledgment of Parties concern'd in Interest ; which is allowed for a good Testimony and strongest against themselves.

Ans.

Ans. I do not like to have the King and his People to have divided Interests. Prerogative and the Peoples Liberties, should not be look'd upon as Opposites. The Prerogative is given by Law to the King, the better to enable him to protect and preserve the Subjects Rights. Therefore it truly concerns the People to maintain Prerogative.

I could cite several Parliament Records wherein the poor House of Commons have been forced to submit themselves, and humbly beg pardon of the King, for doing no more than their Duty, merely to avert his displeasure. See the Case of Sir Thomas Haxey, whom the King adjudg'd a Traytor, for exhibiting a Bill to the Commons for the avoiding of the outrageous Expences of the King's House 20 R.2. num. 14, 15, 16, 17, and 23. and the Commons were driven to discover his Name to the King, and the whole House in a mournful manner craving pardon for their entertaining of that Bill.

No doubt, as good an Authority against the Commons for so lawcily meddling in a matter so sacred, and so far above them. Yet afterwards, 1 Hen. 4. num. 91. that Judgment against Sir Thomas Haxey was revers'd.

As for the distinction, pag. 30. of a Disability actually incur'd before the meddling in an Office, and where the Disability is prevented by the coming of a Dispensation; I answer, That its being so prevented, is but *Peticio Principii*, and a begging of the Question. And to this Distinction I have (I think) fully spoken in the foregoing Argument, fol. 40.

The late Parliament, in making this Act of 25 Car. 2. had, no doubt, a prospect that probably the Crown would descend upon a Popish Successor; and they levelled this Act against the Dangers that might then befall our Religion and Liberties, and they thought it a good Security: But it is all vanished and come to nothing, by occasion of this Judgment in the Case of Sir Edward Hales. And that must be justified by a (*Fiat Justitia*.)

As to the Objection that the Chief Justice fancies might have been made against him, or advice given him that he should rather have parted with his place, than to have given a Judgment so prejudicial to the Religion he professes, pag. 33.

This, I lay, that for my part I should never have advis'd him to have parted with his Place, much less to have given a Judgment against his own Opinion. But let his Opinion be what it was, yet seeing the clear intention of the Makers of the Law, contrary to that his Opinion, and knowing the desperate effects and consequences that would follow upon dispensing with that Act, (for we were upon the brink of destruction by it) and taking notice (as this Chief Justice and the rest of the Judges needs must) that the King had first endeavour'd to have gain'd a Dispensing Power in this matter from both Houses (which was the fair and legal course) and that yet that very Parliament which out of too great a compliance with those times, had over-look'd so many Grievances, and conniv'd at the King's taking and collecting of the Customs, (though in truth the Collectors, and all that had any hand in the receiving of them, incur'd a *Praemunire* by it) not to mention the ill Artifice used in gaining the Excise, yet that Parliament of the King's, boggled at the Dispensing with the Act of 25 Car. 2. knowing the mighty Importance of it.

And though they could not but take notice that so many Judges at once had been remov'd, because they could not swallow this *Bitter Pill*, and others brought into their places, as might be justly suspected to serve a Turn, and the King's Learned Council could not at first find out this Prerogative to do his work with, till so many ways had been attempted, and all proved ineffectual; sure in such circumstances it had been Prudence, nay the Duty of the Judges, to have referr'd the determination of it to a Parliament; and the rather, because it was to expound a Law newly made, and the consequences so dreadful, and the intent of the Law-makers so evident.

And this hath been frequently practis'd by Judges, in Cases of far less difficulty and concernment. This I have also enlarg'd upon in my Argument,

Object. But it might have been a long time before any Parliament had been called.

Ans. We ought to have Parliaments once a year, and oftner if need be; and *eadem præsumitur esse mens Regis, quæ Legis*; and we then stood in great need of a Parliament even for the sake of this very Case.

And these hasty Judgments are one ill Cause why Parliaments meet no oftner; the Work of Parliaments is taking out of their hands, by the Judges. And it is the Interest of some great Officers, that Parliaments should not be called, or else be hastily prorog'd or adjourn'd.

As to the point of the feigned Action, which the Lord Chief Justice seems to justify, I conceive he mistakes the force of the Objection. Feigned Actions may be useful; but this Action against Sir Edward Hales, is suspected not only to have been feigned and brought by Covin between him and his Servant and Friend, but it was feignedly and faintly prosecuted, and not heartily and stoutly defended.

Like the practice of common Fencers, who play for a Prize, they seem to be in good earnest, and look very fierce, but agree before-hand not to hurt one another.

*Qui cum ita pugnabat tanquam se vincere Nollet
Agre, est devictus, proditione sua.*

This solemn Resolution was given upon a few short Arguments at the Bar, and without any at the Bench, and upon other Reasons (as I have heard) which were then made use of, are now given by the Chief Justice; but the Times will not now bear them.

After all, I intend not by this to do the Office of an Accuser, nor to charge it as a Crime. But as I think my self bound in Duty, on the behalf of the whole Nation, of my self, (though a small part and member of it) and of my Friends, I humbly propose, That the Judgment given in Sir Edward Hales his Case may, after a due Examination, (if there be found cause) be legally Revers'd by the House of Lords, and that Reversal approv'd of and confirm'd by a special Act of Parliament.

F I N I S.

11/10/17

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